United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7161

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7161

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
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VOLUME III

§ 4 Trial Transcript (continued)

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Third, there is no evidence that the defendants' pricing system based on functional discounts violates Section 1 of the Sherman Act.

Fourth, there is no evidence that defendants pricing system based on functional discounts violates Section 2-A of the Robson Patman Act.

Five, there is no evidence of monopoly, attempted monopoly or conspiracy to monopolize in violation of Section 2 of the Sherman Act.

Six, there is no evidence that defendants have dealt with the plaintiff within the meaning of the Incorrect Purchaser Doctrine in violation of Section 2-A of the Robson Patman Act.

THE COURT: Motions are denied.

Can you start your case now?

MORRIS J. ROWLANDS, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Rowlands, are you familiar with the record of Ford Marketing Corporation during the current year with respect to the sales of crash parts?

A Yes, I am.

Q Can you state how the record of sales of crash parts during the year 1974 compares with the same record forthe year 1973?

A Through June major crash parts were down --

MR. JULIEN: I beg your pardon. Are you talking about nationwide?

Q Is the figure nationwide?

A Yes, it is.

MR. JULIEN: I object to it, if your Honor please.

THE COURT: Overruled.

A The sale of major crash parts, June this year is down 7 percent.

THE COURT: You are on a June fiscal year?

THE WITNESS: No, that is the last time I looked at a report on that subject.

Q Where is your office, Mr. Rowlands?

A Livonia, Michigan.

Q What facility of Ford Marketing Corporation is located there?

A We are located in the national parts depot.

Q Are there offices in the national parts depot?

A Yes, there are.

Q Your office as general sales manager, is located in that depot?

A That's correct.

Q As general sales manager, what in general are your duties pertaining to the origination of policy and changes of policy relating to the distribution of automotive parts?

A As an active heard I review, I make recommendations, and am called upon to support or not support recommendations for policy changes, or initiation of new policies.

Q Are these policy changes of sectional or local or of national applications?

A No, they'd be national.

Q With respect to the distribution of automotive parts, do you have within the Ford parts division some policies that are on a regional or local basis?

A Our policies are national.

Q Are they all established at the Livonia headquarters?

A Yes.

Q You referred to the fact that you were an activity head.

What are the other activities in the Ford

parts division?

A The marketing managers is an activity head, the controller is an activity head, myself, sales manager, supply and distribution manager is an activity head. I believe that covers it.

Q In addition, is there a general manager for the Ford parts division?

A Yes, there is.

Q Does he participate in decisions with respect to the establishment or change of policy?

A Yes.

Q When studies are undertaken with respect to policy is there a section of the operation in Livonia that is charged with preparation of studies?

A The forward plans department under the marketing manager is the activity that must put it into language, though she became sort of the focal point in our studies on that subject.

Q So they are the ones who actually do the drafting?

A Yes.

Q After language is prepared, is that reviewed by various activity managers?

A Yes.

Q Where are the policies and procedures of the Ford parts division laid down in writing?

A We have a policy and procedure manual.

Q I show you Defendants' Exhibit G for identification and ask you if that is the manual to which you referred?

A Yes, it is.

Q The particular manual that I have handed to you states on its cover, Vehicle Dealer Direct Account, National Account, and Car Lite.

Where in your organization is this particular volume of the policy and procedure manual used?

A In the district sales offices.

Q And does it include within its provisions not only the policy and procedure with respect to vehicle dealers, but also direct accounts, national accounts and car lite distribution?

A Yes, it does.

Q And the tabs that appear on the inside are in four different colors, are they not?

A Yes, sir.

Q What are the pages marked with the blue tab?

A The blue tabs are for vehicle dealers.

Q And the red tabs?

A For direct accounts, or distributors.

Q And the brown tab?

A Are national accounts.

Q And the yellow tab?

A Car Lite.

MR. MAC CRATE: I offer Exhibit G in evidence.

MR. JULIEN: May I have one question, your Honor?

What period, or when was this particular booklet, G for identification, when was that in effect? The one that we have here now.

THE WITNESS: You'd have to look at it.

(Pause)

THE WITNESS: It's a continually updated document.

THE COURT: Is that a current one?

THE WITNESS: As to whether this is absolutely up to date, I'd have to check it against a master.

THE COURT: It's reasonably up to date.

THE WITNESS: Reasonably up to date, yes.

MR. MAC CRATE: We produced it in the spring of 1974 to the plaintiff at that time.

THE WITNESS: It would be helpful to the Court, every time there is a change we send out a new check.

THE WITNESS: All right. Let me see it.

(Pause)

THE COURT: What part of this document are you going to call attention to? I take it not the whole thing.

MR. MAC CRATE: No, your Honor. There are various items that we will invite the Court's attention to. For example, under the last tab there is an instruction sheet as to how to prepare or I should say what appears on the statement that goes to customers. It explains the billing procedure and how you read a bill, and certain of that information will make quite clear the testimony that has been given, and will provide a context for that.

THE COURT: All right. I'm not going to receive the whole document. I will receive parts that you designate, and that you will. So if you could give me a designation, all right. We will adjourn now until 2:15.

(Luncheon recess taken at 1:00 o'clock)

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AFTERNOON SESSION

2:30 P.M.

(Trial resumed)

MR. MAC CRATE: Your Honor, there are some outstanding matters with respect to the plaintiff's case. We have not had an opportunity to inspect the revised 106 sufficiently and we request that we have a further opportunity.

THE COURT: Yes.

MR. JULIEN: On the housekeeping matters, if your Honor please, the offer which I made of the previous sheet marked 111, counsel has now produced a sheet which he says was the predecessor of AH and it seems to be the same, your Honor.

THE COURT: To avoid controversy, use Mr MacCrates and we will have that marked 111.

What have you done with respect to the depositions?

MR. JULIEN: On the Rowlands deposition, we have no objection to the parts that counsel for the defense has referred to.

With respect to Rose's deposition, however,

we find that they are attempting to select portions of Rose's deposition which has no reference whatever to the material which we have employed.

THE COURT: Let's go over them right now?

MR. JULIEN: You recollect Rose was the witness who was here last week.

THE COURT: Yes.

(Plaintiff's Exhibit 111 was received in evidence)

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THE COURT: Before we get into the Rose deposition, Plaintiff's Exhibit 109, the deposition of Rowlands is admitted to the extent of all the designated portions.

MR. JULIEN: That is correct. No dispute on that.

THE COURT: Let me see the Rose deposition?

MR. MAC CRATE: Your Honor, this is the Rose deposition and you will find the portions marked by defendants at pages 141 to 147. The earlier page markings are the markings of the plaintiff.

MR.JULIEN: Our plaintiffs leave off at 116.

THE COURT: What is your objection?

MR. JULIEN: The portions marked by the defense have no relationship whatever to the parts which we have

offered and I understand the rule, if I may suggest, the rule to be that with respect to that, since this is an employee who was here, that the defense has to call him.

THE COURT: I will read it later and rule on it.

Decision reserved on that.

(Plaintiff's Exhibit 109 was received in part in evidence)

MR. MAC CRATE: With respect to the Wasser deposition, your Honor, we would offer pages 3 lines 5 to 15.

MR. JULIEN: Your Honor, that is principally colloquy between Mr. Schlesinger and Mr. Carrad and I don't see any purpose in having that before the Court.

THE COURT: You are offering what?

MR. MAC CRATE: Page 3.

MR. JULIEN: I don't see that adds anything.

THE COURT: What is HB for identification?

MR. JULIEN: That was a handwritten list which Mr. Carrad gave to Mr. Schlesinger Sunday morning when the examination started of documentation that he desired.

THE COURT: Wait a minute, I am not clear.

You want to introduce what?

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MR. MAC CRATE: Page 3 lines 5 to 15 inclusively, what I have marked with a box. Please disregard the line at the bottom of the page which I meant to indicate had been deleted.

THE COURT: Wouldn't you stipulate, just so we don't have to have a document, wouldn't you stipulate that Mr. Wasser has been FLM's attorney and accountant from 1965 to the present time?

MR. JULIEN: Yes.

THE COURT: It's stipulated and we could eliminate the need for the deposition.

M O R R I S J . R O W L A N D S , resumed.

MR. MAC CRATE: Your Honor, as we recessed, the course of questions which we identified were those portions of the policy and procedure manual which we would desire to call to the Court's attention and over the luncheon recess, I have marked those pages and I have separated them from the looseleaf binding of the procedure manual.

MR. JULIEN: I don't know why this wasn't shown to me before we started up again.

THE COURT: That I can't help. There has been obviously a delineation.

Why don't you show those to Mr. Julien and if he has any objection, he can offer an objection.

DIRECT EXAMINATION CONTINUED

BY MR. MAC CRATE:

Q Mr. Rowlands, in addition to the policy and procedure manual which is provided to the districts, is there a description of policy and procedure material to franchise dealers?

A Yes.

Q Referring to Defendants' Exhibit G for identification, what portion of the district manual is furnished to franchise dealers?

A Dealers would get the blue copies.

Q That is, the pages with the blue tabs?

A That is correct, the blue tabs.

Q In the policy and procedure that is laid out in the policy and procedure manual, are there several levels of distribution recommended?

A Yes.

Q What are those levels?

A We recommend a distributor level, a wholesaler, sometimes referred to as jobber; the retailer and consumer.

Q Would you define for us what you refer to as

the distributor level?

A The distributor level --

THE COURT: Couldn't we possibly save some time.

Mr. Julien, have you looked over the pre-trial order page 9? That contains a schematic of the levels of distribution that I think would be without any real contest at all and in order to prevent somebody from laboriously testifying to a lot of things, if you would stipulate to that, I think I could get the point and I don't think we'll gain anything by having the witness testify to all that stuff.

MR. JULIEN: Yes, gladly.

THE COURT: You will stipulate to what?

MR. JULIEN: To the fact that with this witness to be interrogated concerning the lines of distribution, he would testify that they were in accord with the schematic drawing shown on page 9 under paragraph 5 of defendant's contentions.

Is that sufficient for your purpose?

THE COURT: It's sufficient for mine.

MR. MAC CRATE: Your Honor, we have prepared a chart in large form which Ihave here on the blackboard and I have smaller rendition of the same chart.

THE COURT: I have it in the pre-trial order paragraph 5, don't I?

MR. MAC CRATE: Yes.

THE COURT: He stipulated that if the witness testified or a Ford witness testified, he would testify these were the levels and channels of distribution.

Doesn't that eliminate the need for the testimony?

MR. MAC CRATE: It will remove the need for the testimony. Iwas just suggesting that we might have it in the record in a convenient form and I have a chart here in my hand which is the same.

THE COURT: That is fine. Why don't you have that marked and it will be admitted into evidence. It's the same as this paragraph 5, isn't it?

MR. MAC CRATE: This would be Defendants' Exhibit I.

MR. JULIEN: Your Honor, with respect to the sheets which I was shown before, would Mr. MacCrate tell me, did you pull out all of the dealer sheets from this district policy and procedure manual?

THE COURT: Please, consult about that a little later.

Defendants' Exhibit I is received.

(Defendants' Exhibit I was received in evidence)

Q Mr. Rowlands, are the levels to which you have referred of distributor, jobber and dealer, reflected in the pricing system of Ford?

A Yes.

MR. MAC CRATE: Your Honor, I ask this question by way of clarification of information that is already in the record although it is somewhat duplicative of information and stipulation.

Q By what names are the three channels of distribution known?

A We refer to it as the dealer channel and the independent channel and the national account channel.

Q When you refer to the independent channel, which of the three channels reflected on Exhibit I do you refer to?

A The one that is headed up there by direct account warehouse distributors.

Q Do you recall, Mr. Rowland, when Ford first began to grant wholesale incentives in the distribution of automotive parts?

MR. JULIEN: Isn't that covered by our stipulation, your Honor?

THE COURT: Is it '68?

THE WITNESS: No, it goes back to the '50s.

Q You said it went back to the 1950s.

A Yes.

Q Would you explain the general theory and function of the wholesale incentive as viewed by the Ford parts division?

MR. JULIEN: May I have a preliminary question.

Did you occupy the position which you have now back in the 1950s?

THE WITNESS: No, I did not.

MR. JULIEN: I will object to that.

THE COURT: Overruled.

A Ford Motor Company wants its vehicle dealers to be active in both the retailing and wholesaling of parts.

In order to make it possible and give a Ford dealer incentive to wholesale parts, it is necessary to give them an acquisition cost that is approximately the same as the other independent wholesalers and jobbers in the market selling comparable type parts to the same retail customers that the Ford dealer would like to sell to.

So, the whole philosophy of our wholesale

incentive was to give the dealer incentive to make wholesale parts sale and to give him an acquisition price which would make him competitive in going after that business.

Q It has been stipulated that the wholesale incentive was first granted for crash parts in 1968.

Would you tell the Court the reasons for extending the wholesale incentive to crash parts at that time?

MR. JULIEN: I respectfully submit, if your Honor please, reasons having to do with pricing or restraints are not proper methods of defense in such a case.

THE COURT: Objection overruled.

A The wholesale incentive was placed on crash parts at the direction of FTC --

MR. JULIEN: That I move to strike out.

THE COURT: It's stricken.

A I guess the right word is probably the behest of FTC.

MR. JULIEN: Move to strike.

THE COURT: Stricken.

A My understanding is the only reason wholesale incentive was placed on crash parts was because FTC's request to the company.

MR. JULIEN: Move to strike.

THE COURT: That is a little different. This witness can testify as to his understanding.

MR. JULIEN: His understanding of what a regulatory agency has done --

THE COURT: I was trying to articulate it. I did strike the two descriptions which seemed to me to be attempts to present the facts about what the FTC did in a conclusory manner and I think if we are going to get the facts about what the FTC did or didn't do, we better get the facts, but as far as what this man's understanding of the reasons for company policy, I will certainly receive evidence about that and it will be limited to just that.

The objection is overruled.

MR. JULIEN: May I state one further ground to be sure I have brought everything to the Court's attention?

THE COURT: All right.

MR. JULIEN: The witness' present answers are indeed a further step removed in the field of hearsay. What the action may have been of some regulatory agency, he is speculating as to what that was and he understands from some other sources what that was. We

are a further step away from probative proof.

THE COURT: I will let you testify as to what was your understanding as to the reason why Ford gave the incentive in 1968.

THE WITNESS: It was my understanding it was done at the behest of the Federal Trade Commission.

THE COURT: And that was the only reason it was done?

THE WITNESS: To my understanding.

MR. JULIEN: Move to strike.

THE COURT: Denied.

Q When the wholesale incentive was extended to cover crash parts in 1968, was this brought to the attention of those in the distribution system concerned with such policies?

A By that you mean the general manager of our division?

Q Was it brought to the attention of district managers and others who were in the distribution system?

A Yes, it was.

Q In what manner was it brought to their attention?

A There was a communication on it.

Q Do you recall who sent the communications to

whom?

A Right offhand I am trying to remember whose hand was on that paper. It would be the type of communication that I would sign or the general manager.

Q I show you Defendants' Exhibits P-1, P-2 and P-3 for identification and ask you if you can identify the communication or communications by reference to those documents.

A Yes. This is a communication advising -- this is P-1. This is addressed to the district sales managers advising them --

MR. JULIEN: I don't think the content is called for.

A I do recollect P-1. I do recollect P-2 which was sent to Ford and Lincoln-Mercury dealers and P-3.

Q P-3 was directed to whom?

A Ford and Lincoln-Mercury dealers.

Q Were all three of these communications sent out on or about the end of October, 1968?

A Yes, right around that time.

MR. MAC CRATE: I offer them in evidence.

THE COURT: Is there any claim that anybody was ignorant of the policy? I don't see what this has

to do with the case.

MR. MAC CRATE: It relates to the whole basis upon which this policy was instituted in the fall of 1968.

THE COURT: Does it say anything about the basis for the policy that I don't already know?

MR. MAC CRATE: I submit, your Honor, the contemporaneous statements to the trade as to the basis for it are an admissible demonstration of why this was being instituted.

I think, your Honor, there have indeed been suggestions as to the content of these memoranda, but these are the contemporaneous memoranda sent out to the trade and I suggest that that is the most probative of this particular matter.

MR. JULIEN: I respectfully submit, your Honor, there is no rule of evidence that makes a self-serving statement more probative at one time than another.

Repeated in each of these exhibits, and not always in the same way, is some statement that this is at the insistence of some regulatory agency, which is entirely self-serving.

THE COURT: Is that the reason you want it in, Mr. MacCrate?

MR. MAC CRATE: It states the reason in that way but goes on to explain just what is being done at that time and why and I submit, your Honor, there is no more direct evidence --

THE COURT: I don't know what the issue is. I suppose there is an issue about what the FTC did. I wouldn't possibly admit these documents to prove that. If there is some other issue I am supposed to deal with on which these are evidence, nobody claims that the Ford distribution system was ignorant of the facts about the wholesale incentive --

MR. MAC CRATE: Your Honor, there is a distinct difference.

THE COURT: What is it you want to prove through these documents other than using them as evidence that this was done at the insistence of the FTC, what other points are you trying to prove from these documents specifically?

MR. MAC CRATE: That the extension of the wholesale incentive to crash parts in1963 was not upon the same basis as the incentive as had been given for other automotive parts.

THE COURT: Why don't you ask this witness. I will not receive them.

MR. MAC CRATE: I would point out, your Honor, for the record, that statements of intent at the time of their issuance would, I respectfully submit, be probative of the intent at that time.

THE COURT: You haven't even asked this witness about that and it seems to me you can just go ahead and ask him. That is the best way to get at it, he is here.

BY MR. MAC CRATE:

Q You have testified, Mr. Rowlands, as to the general theory and function of the wholesale incentive as viewed by the Ford parts division.

Were these same concepts, in your understanding applicable to the granting of wholesale incentive for crash parts when it was first granted in 1963?

A No.

Q Would you explain your reasons for your answer?

A There was no competition selling these same types of parts, so we had no need to provide an incentive to get the dealer to wholesale them, nor did we need to provide an incentive to make him competitive with any other supplier of those parts.

Q This particular type of part, it has been

stipulated, is sold to the dealers solely by Ford Motor Company in the earlier years and more recently by Ford Marketing Corporation, and it is your testimony that with respect to crash parts, there was no other channel of distribution.

A That is correct.

THE COURT: As distinct from other kinds of parts like batteries or spark plugs?

THE WITNESS: Filters, shocks.

THE COURT: On those you sought to make your dealers competitive as far as spark plugs, batteries and so forth, is that right, you had to give him the benefit of a low price.

THE WITNESS: An acquisition price comparable to wholesalers and jobbers of those parts.

THE COURT: Since Ford was the only source, you didn't have competition from outsiders on crash parts.

THE WITNESS: Correct.

THE COURT: Nor did the dealers.

THE WITNESS: Correct.

THE COURT: Obviously there was another economic consideration. They are not going to be able to wholesale

them if they have to sell them at such a high price that the body shop buying them wouldn't be competitive with the dealers. There is some element of that, isn't there, in making the repairs?

THE WITNESS: This is what was behind the move to have these parts carry the wholesale incentive.

MR. JULIEN: I can't hear the answer.

THE COURT: It was your understanding that was the motivation lying behind the FTC request?

THE WITNESS: So the repair garage would be able to buy the sheet metal, the crash parts and own them at the same price as a body shop operating out of a Ford dealership.

THE COURT: That is pretty obvious. Go ahead.

Q With respect to the demand for crash parts, does Ford Marketing Corporation attempt in any way to increase consumption of crash parts?

A No. It's a line we don't put any promotion on. It's just kind of depended on the number of crashes you have. It depends somewhat as to how much straightening an independent body shop would do. Pretty much, it's a matter of the number of crashes and the severity of it.

Q Referring now to Defendants' Exhibit H and to

the column in the parts and accessories parts list entitled General Trade Price.

When did that column first appear?

A I am quite sure that column went in at the same time that the wholesale incentive was placed on crash parts which would have been about November of 1968.

Q How did that come about?

A That came about at the insistence of the FTC.

MR. JULIEN: I object to that and ask it be stricken.

A It's mu understanding that came about at the insistence.

THE COURT: I will let him testify as to his understanding. It doesn't prove anything about what the FTC did or didn't do. I will take it for what it's worth about Ford's understanding.

Your understanding was what?

THE WITNESS: It was my understanding that the trade price was put in at the insistence of FTC.

Q What was your understanding as the purpose for makign that addition to the price list?

MR. JULIEN: That too I have to object to as calling for some conclusion.

THE COURT: Overruled.

A My understanding is it was put in the book to suggest to the dealer that that is the price that he should charge when selling crash parts to an independent garage, an independent body shop. It was to try and carry out the objective of having independent body shops own crash parts at the same price as a body shop operating out of a Ford dealership.

THE COURT: This was to suggest the price that the dealer would sell to the body shop?

THE WITNESS: Yes, sir.

Q There is a column headed dealer price and another column headed general trade price.

What is the relationship between the figures in those two columns?

A Dealer price and general trade price would be the same. A dealer price is what the dealer pays us for a part that he uses in his own shop.

Q His Honor inquired the other day as to why there were so many blanks in the general trade price column whereas the dealer price column appears to be filled on each page.

Can you explain that?

A There would be a general trade price only on those parts carrying a wholesale incentive.

Q There has been marked, Mr. Rowlands, an exhibit marked Plaintiff's 112 which is a copy of the Ford sales and service agreement.

Is this the form of agreement executed by Ford Marketing Corporation with franchise dealers?

A I guess I should look at that document.

Yes.

Q Are the same terms in the Lincoln and Mercury agreements?

A The same terms in the Lincoln-Mercury agreement as in the Ford agreement.

Q When we speak of franchise dealers, is this agreement, Exhibit 112, the actual franchise agreement with such dealers?

A Yes.

Q What dealer functions does the agreement embrace?

A It basically spells out the responsibilities we have to the dealer and the responsibilities the dealer has to Ford Motor Company, Ford Marketing Corporation, as it relates to the sale of vehicles, the sale of parts and sale of service.

Q Has Ford followed any particular policy as to the functions it seeks a franchise dealer to perform?

A Yes. In respect to the sale of parts and the sale of service, we try to make sure that the level of parts service and repair is such that people will continue to buy another Ford.

Q Has this been a long-standing policy of the company?

A Yes, sir.

Q Does it go back over the entire period that you have been associated with Ford Motor Company or Ford Marketing Corporation?

A For the entire period.

Q When did your association commence?

A Tomorrow will be my twenty-ninth anniversary.

Q You better do the subtraction.

A Twenty-nine years and I started in 1945.

Q If FLM were to act as an agent of a franchise dealer in making sales to body shops and independent garages, is there any provision in the agreement, Exhibit 112 that would foreclose that kind of agency arrangement between a dealer and FLM?

MR. JULIEN: Objection.

THE COURT: Sustained.

Q If FLM were to act as an agent of a franchise dealer in making sales to body shops and independent

garages, is there any provision of Ford Marketing Corporation policy which would prohibit the dealer from claiming incentive on such sales?

MR. JULIEN: I object to it.

THE COURT: Sustained.

Q In the period 1968 to date, have any particular difficulties been encountered by Ford Marketing Corporation with respect to claims for wholesale incentives?

A Yes.

Q Could you identify some of the difficulties that had been encountered?

MR. JULIEN: Now, if your Honor please, unless these relate to the plaintiff in this case, I submit they are irrelevant and have no place in this testimony.

THE COURT: I think you may be right but I think I better hear the evidence because I think Mr. MacCrate's theory is, Ford is entitled to take certain general steps to please its distribution system.

I will hear the evidence.

A Our wholesale incentive costs rose significantly in 1969.

Q As against the preceding year?

A As against the preceding year -- the best way I can put it. Our general manager became extremely

concerned --

MR. JULIEN: Objection. Move to strike it out.

THE COURT: It's stricken.

Q What was the situation as you recall it that arose in 1969 with respect to the costs of wholesale incentive allowance?

A Just that in meetings with activity managers, there were discussions on how our wholesale incentive costs were rising significantly.

Q Did you take any action at that time as a result of what was then perceived?

MR. JULIEN: Do I understand your Honor's previous ruling so I need not interrupt, as to the type of evidence, I have a running objection to it.

THE COURT: I will hear about the difficulties. As far as the relevance, I will overrule that objection. If there are hearsay or other objections, that is another matter, but I will overrule the relvance objection to the whole line.

MR. JULIEN: I do object, if your Honor please, on the ground of hearsay as well.

THE COURT: Let's hear the question.

(Question read)

THE COURT: He can testify about what Ford did without getting into specific conversations. If we get into conversations about this or that or discussions at meetings, that is another problem.

You are being asked what did Ford do?

A Conducted a number of audits.

Q What other actions were taken at that time?

A Starting in early 1970 we went into an entire study and review of the entire wholesale incentive-claiming system.

Q So that in addition to the taking of a number of audits you also undertook a study?

A Yes.

Q With respect to the audits, was there any special arrangement made for those audits?

A I don't know.

Q Was there a particular individual in Ford who was charged with responsibility for conducting those audits?

A The controller's office was responsible for audits and Mr. Bill Peers.

Q You have referred to a study that was undertaken. Of what did that study consist?

A It was the whole spectrum of eligible parts as to: Are we putting wholesale incentive on the correct parts? Are we paying wholesale incentive on parts which we accomplish nothing by doing so. Eligible customer -- does our language identify eligible customer properly? Then the entire claiming system as to whether or not the documents we received in the incentive-

control area of the division were the kinds of documents that would tell us whether the claim really was a legitimate claim or not.

THE COURT: What do you mean by "legitimate claim"?

THE WITNESS: Whether or not it involved an eligible part and/or an eligible customer and whether the amount of wholesale claimed was the proper amount.

THE COURT: Were there any particular problems about eligible customer that you were worried about?

THE WITNESS: Yes.

THE COURT: What was that?

THE WITNESS: We were concerned about an eligible customer, as it related to an eligible customer where we did not have the administrative ability to know where -- let me start over and be specific.

We were concerned about an intermediary where the language of our policy said that he was an eligible customer but then the language went on to say he was an eligible customer as long as he sold to eligible customers, and that became something that really was not administrable.

We say that when a Ford dealer sells to another Ford dealer, say a crash part, that is not an

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eligible sale for wholesale incentive. Ford dealers sold to an intermediary who then sold to a Ford dealer --

THE COURT: Is that what you were worrying about, about having this wholesale-incentive device used as a means for conveying parts between Ford dealers, sort of indirectly, so the Ford dealers would get the incentive allowance in effect but be doing rate work with those parts themselves?

THE WITNESS: That was one of our concerns.

THE COURT: And I take it another concern would be what?

THE WITNESS: That we would be paying a wholesale incentive to a dealer when he did not in fact accomplish the wholesale function. You accomplish the wholesale function only when you move the merchandise one step down in distribution to the retailer level.

The language of our policy made it possible where we would be paying wholesale incentive to a dealer when he did not perform the function.

THE COURT: Would be paying the wholesale incentive to a Ford dealer when he didn't perform the wholesale function meaning what was your idea of the wholesale function?

THE WITNESS: Performing the wholesale func-

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tion?

THE WITNESS: Performing the wholesale function is moving the merchandise from the wholesaler level down to the retailer level. That is the wholesale function.

BY MR. MAC CRATE:

Q You have referred to various phrases of the study of the wholesale incentive that was going on in 1970.

Did you from time to time have status reports on the progress being made with respect to various phases of the study?

A We had continuing meetings and usually the meeting, as part of the meeting, there would be some kind of a writeup on the proposals we were looking at at that particular meeting. I guess they were the kind of alternatives and proposals that we were considering at each of these meetings.

Q I show you Defendants' U for identification and ask you if this is such a document as you referred to.

Q Was that document used at one of the meetings at which you attended?

A I am sure it was. I wouldn't be able to identify at which particular one.

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Q When did that meeting take place, approximately?

A It would be some time in the February-March period of 1970.

Q And you had before you at that time this document that is marked Defendants' U for identification?

A That was our typical way of conducting a meeting, that he would pass out the document and that would become the structure of our meeting.

Q And this document was before you at that meeting?

A I am sure it would be.

MR. JULIEN: I have no objection.

THE COURT: What is the purpose of this?

MR. MAC CRATE: Your Honor, this outlines six phases of investigation that were going forward simultaneously with respect to the wholesale incentive. It shows the steps that were being taken. With respect to each I would like to inquire of the witness with respect to the separate phases and their implementation and the period of time over which this study has continued.

THE COURT: What issue does it go to that has to be decided in this case? I am not just interested in history for history's sake. It might be nice to

know this, but I don't see the relevance.

The fact is, and it is stipulated, that Ford withdrew the incentive allowance with respect to sales to people like FLM. Suppose that that was the result of five years of consideration or two years of consideration. I don't know anything in the law that makes the letality of what Ford did depend on how serious or how thorough or how long the inquiry was. I can't see that in an antitrust case of this kind -- I have never heard, in putting in a lot of proof, how long the study took to build up to the decision.

MR. MAC CRATE: There has been an argument on the part of the plaintiff that the wholesale incentive change in 1971 was directed at FLM and this is directed to that very point. It shows a substantial study going forward, various steps being taken, all as a part of the formulation of the national policy of Ford, and to suggest that a particular aspect of this whole series of changes was directed at one particular party, which was the thrust of plaintiff's suggestions, we feel can be laid to rest by this demonstration.

THE COURT: Okay, I get your point.

I really don't know of any evidence that you put in in your case, and I haven't seen the depositions so

maybe I am missing something crucial, but I would say there is no evidence or virtually no evidence of two things on your case which has rested.

First, that there was what I will call an express conspiracy between Ford and the dealers in which the Ford Company and the dealers, the dealers being active, promoting members of the conspiracy, got together to do something about FLM.

MR. JULIEN: I do not claim expressly --

THE COURT: You asked Mr. Rowland when he was on the stand before -- I believe you asked him was there a discussion with the dealers before this policy, and he said no, and you have no contrary evidence to that, unless it is in the depositions.

MR. JULIEN: I don't contend there is proof of an express sitting down and arranging a conspiracy. I claim, of course, as you understand, it is implied from the conduct of the parties.

THE COURT: As I understand it, there is no evidence now of any conversations either within Ford or between Ford people and the dealers of a motive or purpose to change the policy on incentives or do anything else to protect the Ford dealers from competition, no evidence of such conversation.

MR. JULIEN: Here there is. In your larger question there is.

THE COURT: There is no evidence of such conversations.

MR. JULIEN: There is.

THE COURT: What?

MR. JULIEN: You are saying either the conspiracy or its implementation. I understand that to be within the ambit of your present question. There is such testimony. The testimony is as follows:

In the deposition it is said that FLM is unique in its business as a wholesaler of crash parts other than franchised dealers. We have testimony already in the exhibits to the effect that there were discussions between Pollack and Rose with respect to cutting off specifically FLM . This appears in correspondence.

THE COURT: In the depositions?

MR. JULIEN: No.

THE COURT: I get your point, Mr. MacCrate, and I will admit it. You are trying to negate the act of predatory conduct.

MR. MAC CRATE: Yes.

(Defendants' Exhibit U was received in evidence.)

BY MR. MAC CRATE:

Q In Defendants' Exhibit U, in the column headed "Phase," No. 1 required dealers to purchase parts direct from the company.

Would you explain what that consideration was?

A Yes. Our policy at that time read that an eligible part was one purchased direct from Ford Motor Company or from a Ford Dealer who bought it from another Ford dealer who purchased it direct from Ford Motor Company, or from a predecessor dealer who purchased it direct from Ford Motor Company.

Q What problem did that create?

A The problem that created is that we had audits where dealer A would sell it to dealer B and then in an audit we would find dealer B, when we audited dealer A, they would find that dealer B had not purchased it direct from Ford Motor Company, so there would be a chargeback to dealer A. Dealer A took the position: Your policy puts me in an untenable position. I had no way of knowing that Dealer B did not buy it from you.

This came up on a few occasions so we decided we would eliminate the problem by just changing our policy to read that dealer A had to buy it direct from us

or from a predecessor dealer who bought it direct from us and eliminate any possibility of placing a dealer in an untenable position.

Q Do you recall when that change in policy was made?

A Around May of 1970.

Q Looking at the list of six phases that appear in the left-hand column of Exhibit U, would you run down them one by one and indicate what was done, very briefly, by Ford with respect to each phase?

A No. 1, that is the one I just referred to. That was accomplished.

No. 2, make crash parts ineligible for incentive when sold for export.

MR. JULIEN: I don't think that has anything to do with our case.

A That has not been done.

No. 3, revise statement of eligible sales, ineligible sales to prevent dealer misinterpretation, and part C, the abuse of the emergency provision regarding the sales between Ford dealers, that we feel we are cleaned up with our July, '71 policy change.

No. 4, establish a system to preapprove wholesale customers and identify these customers by a code num-

ber. We have not acted on that.

No. 5, to the extent feasible, eliminate wholesale incentive on slower moving parts, generally classified as class B and C. We have acted on that, removing 10 or 12 thousand part numbers.

No. 6, revise the wholesale incentive claim procedure for one based on claim by invoice to a claim system by part number with a division supplying a preprinted claim pad. Also, determine the feasibility of establishing a new system whereby the division would sell to dealers at jobber price all parts purchased in excess of agreed to amount which represented expected retail usage. The first part of No. 6 we accomplished with our whole wholesale incentive claiming system, which went in I believe January of '72. The second part having to do with really a form of net pricing we have not acted on.

Q You referred to a reduction in the number of parts bearing wholesale incentive. There has been testimony regarding the percentage of parts that bear wholesale incentive. Have you made any comparison of the percentage of crash parts that bore incentive in 1969, 1970, right up to date?

A Our Ford plans department have.

Q What does that analysis show as to the range of percentage of Ford crash parts bearing a wholesale incentive between the years 1969 and 1974?

MR. JULIEN: Excuse me.

If your Honor pleases, the percentage at the manufacturer level does not necessarily in any way bear upon the percentage that FLM has with respect to parts that are incentive and which are not.

THE COURT: Overruled.

A The numbers that I can bring to mind: in 1971, 63.3 per cent of our total crash parts, speaking in dollars now, for every $100 million of crash parts we would sell to dealers, 63.3 million of those crash parts would be wholesale-incentive-bearing numbers.

1974, the first six months in 1974, that number was 48 per cent.

THE COURT: I thought you were really talking about the items. I don't think what I can deduce from the fact that less dollar volume now of crash parts is covered by the incentive allowance than it was in '71.

MR. MAC CRATE: Your Honor, on the plaintiff's case it was dollar volumes that were being used. It is exactly the same measure that we are suggesting, and if the percentage of dollar volume of crash parts bearing

the incentive has gone down from 63.4 to 48 per cent I submit that that would have a profound effect upon the claiming on crash parts by any dealer at this time.

THE COURT: It is a fast difference. Their percentage figures were based upon FLM's own percentages.

I would agree it is not a very precise way of proving what parts in later years were covered by the incentive allowance, but this kind of calculation based on Ford's overall dollar volume doesn't really do much either.

If anybody is interested in dealing with the specific issue of what parts FLM would have gotten the incentive allowance on after November, 1972, I suppose that they better make such a figuring because I don't think any information we have either way goes very far.

MR. JULIEN: I fall back on, if your Honor pleases, the Bigelow case, which says it is recognized there can't be any precision and there has to be a lot of speculation.

THE COURT: This is available to you. You know the parts that were sold by FLM and it certainly is available to the plaintiff to go through and find out on which parts that incentive allowance would have been

gtanted if PLM was in the eligible category of customers. This isn't the situation where your proof is impossible. We don't have any impossibility.

I don't want to belabor it now but I think you have a certain vagueness.

We will come back to it.

Q In May of 1970 was a problem with respect to the use of secondary parts codes in the New York district brought to your attention?

A Yes.

Q How did it come to your attention?

A I believe it was transmitted by the regional sales manager to Ed Stroh, a copy to me.

Q Who is the regional sales manager?

A At that time Tom O'Halleran.

Q What was the nature of the problem?

MR. JULIEN: Rather than that, if your Honor pleases, if this is a writing, can't we see it rather than having some characterization of it.

THE COURT: Objection overruled.

MR. JULIEN: It is hearsay.

THE COURT: Overruled.

Q Mr. Rowland, I show you a copy of Defendants' Exhibit Y for identification and ask you if that is the

communication to which you have referred?

A Yes, it is.

MR. MAC CRATE: In the interest of saving time, I would offer Exhibit Y in evidence.

THE COURT: Any objection.

MR. JULIEN: No, your Honor.

THE COURT: It is received.

(Defendants' Exhibit Y was received in evidence.)

zx Q Mr. Rowland, with Defendants' Exhibit Y, did you receive additional papers from the New York district?

A Yes. This came in quite a thick package. In fact it was thick to the point where it was put in a binder.

MR. JULIEN: Would you oblige me by keeping your voice up.

Q I show you Defendant's Exhibit X1 to X15 for identification and ask you if you can identify that as a portion of the enclosures to Defendant's Exhibit Y.

MR. JULIEN: I don't know what kind of sequence he is putting it in.

A Those are documents that I recall being transmitted with this letter.

Q With the memorandum from Mr. O'Halleran to

Mr. Stroh?

A Yes, dated May 20th.

MR. MAC CRATE: I offer them in evidence.

THE COURT: What is that, X1 through what?

MR. MAC CRATE: Through 15, inclusive.

THE COURT: What is your position on that?

MR.JULIEN: No objection.

THE COURT: It is received.

(Defendant's Exhibit X1 through X15 was received in evidence.)

THE COURT: You said a minute ago, one of your concerns at the time of the study or the studies about wholesale incentive discount was your concern about dealers not performing the wholesale function, and you distinguish between that concern and the concern about simply transfers among Ford dealers, right?

THE WITNESS: That is correct.

THE COURT: Did you have in mind a specific problem, namely, FLM, when you were concerned about the dealer not performing the wholesale function?

THE WITNESS: Any setup like an FLM setup would concern us.

THE COURT: That isn't my question.

In 1970, at the time of this study, did you

have FLM under consideration?

THE WITNESS: Only to the extent they represented the kind of situation we could have nationally which we didn't know how to cope with it. We didn't know how many we would have.

THE COURT: I wish you would stick to my question.

In considering this problem, did you have in mind FLM?

THE WITNESS: No, the consideration was larger than that.

THE COURT: But the larger consideration -- the whole is made up of the parts. I am asking you if at the time you made this study you had under consideration FLM, among other things?

THE WITNESS: Yes.

THE COURT: What was your concern about FLM?

THE WITNESS: FLM per se? That was the audit, as you recall, your Honor, which was a very clean audit. We were looking at things that were causing us big dollar losses. FLM was a concern because we saw it as the type of sale where we lost control, but FLM was way back in my mind because we were thinking about the

big dollar losses to us where our costs were out of control. FLM was not in the front of our mind because it was a very, very modest chargeback. It was not one of the situations that was given to us, but the structure of an FLM we recognized as one that potentially could cause us great problems around the country.

THE COURT: Why?

THE WITNESS: Because when we sell to a dealer, once he sells it to a customer, then it is gone. All we can do is look at the sale the dealer made and the language of our policy suggested that we had to know where the intermediary sold it in order for us to determine whether or not it was an eligible sale. We recognized that as something we could not administer properly.

THE COURT: Why couldn't you? What were you afraid that this fellow like FLM would do that you couldn't have control of?

THE WITNESS: An FLM could buy it from a Ford dealer and resell to another Ford dealer.

THE COURT: We have covered that. Aside from that?

THE WITNESS: We could go in to audit a dealer to whom we sold the part and who subsequently sold

it to FLM,and by our language that said that was an eligible sale, and then if we were to go and audit an FLM type of business, we had no right to do that.

THE COURT: What was it that you thought you couldn't discover because of your not having a right to audit? What was it aside from a possible resale to another Ford dealer that you wanted to have control over,or wanted to find out about?

THE WITNESS: Any customer that we identified is an ineligible customer.

THE COURT: What kind of a customer could that be?

THE WITNESS: If we could take that one exhibit, it identifies everyone we call an ineligible customer; used car operations in a dealership, any department or part of a dealership --

THE COURT: Mr. Rowland, you keep coming back to resales to Ford dealers and I want you to assume that I had that in mind and I am trying to find out from you what other types of resales you were interested in keeping control of or finding out about that you could not do.

THE WITNESS: It would be predominantly the sales to another Ford dealer.

THE COURT: You say "predominantly." I want to know, is there anything else at all that you were worried about keeping control of?

MR. MAC CRATE: Your Honor --

THE COURT: Just a minute.

THE WITNESS: To give you an answer to that I would have to look at the ineligible customers. Because, again, when I say "predominant," the other things were to the back of my mind and right offhand I can't think of anything on that list with respect to ineligible customers because many of them --

THE COURT: Nobody is going to want crash parts to do anything but repair cars with, unless you are a collector.

THE WITNESS: Of course, our policy is for all of our parts bearing wholesale incentive and our policy has to make sense for crash parts as well as all other parts.

THE COURT: What is anybody going to want to do with a part except to put it in a car? And let's stick to crash parts for just a minute.

Anybody who buys crash parts, he would, it seems to me, unless there is some odd reason -- he is going to do one or two things: he is going to use them in

repairing a car or he is going to sell it to somebody else who would use it to repair a car.

THE WITNESS: An individual can walk into a dealership and buy a crash part over the counter and do it himself. That is a retail sale and not eligible for wholesale incentive.

THE COURT: Okay, so you have given me one other.

Were you worried agout that happening?

THE WITNESS: That would be a very small dollar consequence.

THE COURT: I think you covered this when you were here before and you certainly don't need to repeat, but at the time you were making the study in 1970 were you aware of any company at all in the country doing the same kind of thing FLM was doing?

THE WITNESS: I had no specific knowledge of any other company.

THE COURT: Okay.

We will take a short recess.

(Recess.)

BY MR. MAC CRATE:

Q Mr. Rowland, just prior to the recess the court was inquiring as to the sales, ineligible sales, that were

of particular trouble to you.

During the recess I showed you Defendants' Exhibit AH in evidence and I ask you now if that has refreshed your recollection as to another type of sale that was of serious concern?

A Sales to insurance companies do not qualify for wholesale incentive.

Q Would you explain to his Honor what that refers to?

MR. JULIEN: I don't think that is pertinent to this case.

THE COURT: Overruled.

A Our position is that insurance companies are really a retail buyer. They are taking the position of the consumer.

Q Is the volume of sales to insurance companies of a substantial amount?

A I don't have a dollar amount, sir, but I do know that in crash partsinsurance companies are involved heavily.

Q With respect to the New York district multiple code dealer study, which has been marked as Defendants' Exhibit X1 to X15, what action did you take with respect to the subject matter of that study?

A I just delegated to look into the facts and determine what action should be taken.

Q Did there come a time when a report to you was made from the people to whom you delegated the matter?

A As I recall, there was something in the range of six different dealers involved and I don't recall getting a specific report back from each of the six.

Q Did you in due course get a report back with respect to Central Lincoln-Mercury?

A The specific report I got back on that was the audit in the fall of 1970.

Q Upon receiving the audit report in the fall of 1970 what action did you take?

A I acted to terminate the secondary code number of Central Lincoln-Mercury.

Q Do you recall how you carried out that action?

A No. As I recall, I just went through the system, which is normally back to the regional manager, to the district manager, but I don't recall specifically how I did it.

Q Did you in due course receive a report that your instructions had been carried out?

MR. JULIEN: Objection. Hearsay.

THE COURT: Overruled.

A I received a report, I believe it was from Tom O'Halleran, that the direction had been carried out.

Q Ishow you Defendants' CG and ask you if that is the report to which you referred?

A Yes, it is.

MR. MAC CRATE: I offer it in evidence.

MR. JULIEN: No objection.

THE COURT: Received.

(Defendants' Exhibit CG was received in evidence.)

xx Q Defendants' Exhibit CG refers to the fact that the termination was to be effective December 28, 1970.

Did you thereafter receive any further request to report regarding an extension of time?

A Yes.

Q From whom did you receive that request to report?

A Either Tom O'Halleran or Jim Rose.

Q I show you Defendants' CH for identification and ask you if that is the communication to which you refer?

A Yes.

Q From whom did the communication come?

A Tom O'Hallerman.

MR. MAC CRATE: I offer CH in evidence.

MR. JULIEN: No objection.

THE COURT: It is received.

(Defendants' Exhibit CH was received in evidence.)

xx THE COURT: Go ahead.

Q The record shows that effective June 30, 1971 the change was made in the availability of the wholesale incentive which is reflected in Exhibit AH.

Prior to the promulgation of that policy in Exhibit AH in the late spring of 1971 was there consideration given to just what form this change would take?

A Could you restate that?

Q You have testified that your Forward Plans Group prepares the actual language for the implementing of policy. In advance of the change of policy that is reflected in Exhibit AH, was there a proposal circulated by Forward Plans?

A Yes.

Q When did that occur?

A It would have been some time prior to this June, 1971. The exact time, I would not recall.

Q Was the proposal as circulated to the activity managers by Forward Plans in due course approved by your group?

A Yes.

MR. JULIEN: I will object to that on two grounds: as to relevancy and hearsay.

THE COURT: What is the question?

(Question read.)

A By "group" you are referring to --

MR. JULIEN: Just a minute.

Has your Honor ruled?

THE COURT: What is the group you are talking about.

Q I refer, Mr. Rowland, to the group you earlier described of activity managers among whom the proposed changes in policy was circulated.

THE COURT: I didn't understand that that constituted a group or committee that was the approving authority.

THE WITNESS: The activity managers sign off on our policy changes. Not necessarily as a group, your Honor, but the letter may be circulated and we do it individually.

THE COURT: Did they all approve this

change?

THE WITNESS: Yes.

THE COURT: Who decided it, the general manager, the president? Who?

THE WITNESS: After the activity managers concur with the change, it is then reviewed with the general manager.

THE COURT: Who decided on this change finally?

THE WITNESS: It would have been the general manager.

Q And those approvals were made in June of 1971 just prior to the implementation of the change?

A That would be our normal timing.

MR. JULIEN: I don't think that answer is responsive.

THE COURT: I agree.

A I don't recall the specific time of the meeting.

Q Can you recall approximately the time --

THE COURT: I don't really think it makes any difference. It was obviously about this time. Let's go on.

Q Would you briefly state the principal reasons

for this change made in June, June 30, 1971?

A It was to change the language to assure that when we paid wholesale incentive to a dealer, that he in fact accomplished the wholesale function by moving the merchandise down to the retailer and to assure that we had language when we went out to check on whether a wholesale incentive claim was eligible, that we could in fact audit the claim and be sure that we were paying a proper claim.

Q What is a dealer's obligation as to how he uses any incentive allowance paid to him?

MR. JULIEN: I object to it.

THE COURT: What is the question?

(Question read.)

THE COURT: Objection overruled. If you understand the question, answer it. I am not sure I do.

A He can do anything he wants to. There is no obligation.

Q Is a dealer's enyitlement in any way affected by the price or terms on which he resells a crash part?

A No.

Q Have you as the general manager, the general sales manager, at any time given instructions that dealers are not to sell crash parts to jobbers-wholesalers?

A No, I have not.

Q Are you aware of any actions taken or directions given by anyone in the Ford Parts Division directed to preventing FLM from buying and selling Ford, Lincoln and Mercury crash parts?

A No.

Q If Ford Marketing Corporation attempted to sell crash parts directly to body shops, would this entail an additional expense to Ford Marketing Corporation with respect to the sale of crash parts?

MR. JULIEN: I have to object to that. That is certainly not within the issues of our case. It is purely speculative.

THE COURT: If FLM made the sale?

MR. MAC CRATE: No. If Ford Marketing Corporation. This relates directly to a question asked of Mr. Rowland heretofore as to whether or not there would be any savings to Ford Marketing Corporation by the services that were being rendered by wholesalers of crash parts, and I am directing my inquiry to that subject which has been put into this record by plaintiff.

THE COURT: Can I have the question read?

(Read back.)

THE COURT: I will sustain the objection.

MR. MAC CRATE: I refer specifically to transcript page 72.

THE COURT: What was the question?

MR. MAC CRATE: "Q Do you mean by that that the company itself, Ford, achieved a savings as a result of dealers engaging in wholesale work and that savings results in this functional discount afforded them?

"A No, sir.

"Q Well, was there a savings to the company Ford as a result of the wholesale activities of your franchise dealers?

"A I don't know how to respond to that. We pay a wholesale incentive to stimulate dealers to wholesale parts and to give them an acquisition price so that they can compete against other people in the market wholesaling the same type of parts."

THE COURT: I don''t think we want to get into the issue,which I don't think really is in the case anyway, as to the possibility of Ford selling to independent body shops. I don't think anybody is suggesting that and I don't think we want to open that up and I don't think it is opened by the questions you read.

I will sustain the objection.

MR. MAC CRATE: I believe the question of

expense of sales to franchise dealers is also raised by the claim that FLM is entitled to have Ford Marketing sell directly.

THE COURT: That is an entirely different thing. FLM is claiming it has a right to buy directly from Ford, but the little, independent body shops, the question of them buying from Ford certainly isn't presented.

BY MR. MAC CRATE:

Q If FMC attempted to sell crash parts directly to jobber-wholesalers other than their franchise dealers, would this entail additional expense for Ford Marketing Corporation?

MR. JULIEN: Objection.

THE COURT: I will allow that.

A Yes.

Q Would you indicate the nature of that additional expense?

A I probably should respond to my area I understand. In my case in sales --

Q Your area being sales as distinguished from --

A Supply and distribution. The consequences as it might regard traffic costs, et cetera, I am not qualified to speak. In my own area it would have a head count effect. The more customers we have, the more

people I must have to travel the territory and service the accounts.

MR. MAC CRATE: I have no further questions.

THE COURT: Any cross?

MR. JULIEN: I have considerable cross.

THE COURT: Let's go.

MR. JULIEN: May I request that the witnesses here from Ford be excluded from the courtroom while I am examining this witness.

THE COURT: They can wait outside. We are not going to go much longer.

CROSS EXAMINATION

BY MR. JULIEN:

Q Now, sir, when you folks at Ford arrived at your decision in the year 1971 to change these wholesale discount allowances, by that time you personally had seen the '69 audit of FLM, true?

A Yes, sir.

Q So you knew at that time that FLM was a wholesaler in your line of distribution purchasing from one or another of your dealers, correct?

A As was contained in that report.

Q Additionally, when you were having these conferences and others of your associates at Ford, you had

correspondence from some of your people with specific reference to the FLM account during the year 1970; true?

A Yes, sir.

Q This FLM wholesaler -- and you knew they were wholesalers, did you not?

A Yes, sir.

Q -- two of the things established as a result of both audits conducted by your company of their books was, one --

THE COURT: Mr. Julien, we are going over ground you covered quite thoroughly in your direct examination. There is no use to repeat it. You covered the audits, you covered the fact that they were clean audits and as far as FLM selling to so-called eligible people, and all of this is covered.

Let's not repeat that.

MR. JULIEN: I am addressing myself now, your Honor, to what he had in mind at the time, who he was thinking of at the time.

THE COURT: Let's get that, but you can assume I know something of the background here.

Q In '70, as a result of this documentation that I made reference to, did you have any similar documentation with respect to the name of any other wholesaler that you

can tell this court about?

A No, I don't.

THE COURT: By the time you made the change in 1971 did you know of any other wholesaler besides FLM doing this same function?

THE WITNESS: I knew it nonspecifically.

Q The one concern that you were talking about, which you said was predominant in the thinking of yourself and your associates relative to the possibioity that one dealer might sell to another dealer and that both might be claiming an incentive allowance, you formulated something which takes care of that problem, did you not?

A The words you just used, one dealer selling to another dealer, or where they might claim wholesale incentive?

Q Yes. You formulated a method to take care of that.

A Our policy would not allow wholesale incentive on the first sale.

Q And you have a method within your organization to police that problem, do you not?

A Yes.

THE COURT: You are talking about a situation where one dealer sells to another dealer?

MR. JULIEN: Yes. Your Honor recalls he told you this was the predominant thing in his thinking.

THE COURT: Yes.

MR. JULIEN: I am coming to the next point.

Q With respect to one dealer selling to a wholesaler who thereafter sells to another dealer, you are able, are you not, by means of your audit facilities, to check each dealer's books to ascertain their source of supply with respect to each item for which they claim an incentive, true?

A Yes.

THE COURT: I don't understand your question

Q In other words, you are able --

MR. MAC CRATE: Let the witness answer.

Q You are able by your audits to ascertain not only to whom each of your dealers sells, but you are also able to ascertain by your audit from whom each of your dealers purchases its wares, whether it purchases from

Ford or on some occasion as you suspect, purchased from an independent wholesaler; right?

A Only since we put in our new wholesale incentive system.

THE COURT: In other words, you can go to any dealer and find out from whom he bought his parts?

THE WITNESS: No, we can't.

THE COURT: I thought that is what Mr. Julien asked you.

THE WITNESS: I had our new wholesale incentive system check the dealers' purchases by parts group as against claims, so we now had a way to match up what he reports as sales against what we know he has purchased from us; but prior to that claiming system which went in in January of '72, with the dealers' records, we would not know.

THE COURT: Let's talk about the system that went in effect January '72.

What does that show you?

THE WITNESS: Our system as of January '72, we will match up by product line a dealer's purchases from us and apply that against what he has claimed from us of those same product lines to determine whether he is claiming on more parts than he purchased from us.

Example, spark plugs. He might claim on 1,000 spark plugs and our records will show he only bought 300 from us.

THE COURT: I thought Mr. Julien was asking, suppose a dealer sells to FLM and FLM sells to another Ford dealer. Do you have a system whereby you can check where that second Ford dealer buys crash parts?

THE WITNESS: If we were to go to the second Ford dealer who bought it from FLM?

THE COURT: Right.

THE WITNESS: I don't know if an auditor could track that or not.

THE COURT: But you don't right now have any system for doing that?

THE WITNESS: No.

THE COURT: And if you had it, it would be extra expense to you to have to check that and so forth, right?

THE WITNESS: Yes. I am not an auditor. I don't know if an auditor could track that.

Q Let's talk about the system since '72.

If dealer No. 2, that is, someone who has bought a portion of his parts from a wholesaler claims an incentive -- withdrawn.

When did you change your recording policy?

A January of '72.

Q Since January of '72, and let us take a transaction where a dealer is claiming from you an allowance for certain parts under your incentive wholesale policy -- are you with me so far?

A Yes, I am with you.

Q By means of the system you set up in January of '72, you can and do find out from your own records whether those parts for which he is claiming an incentive equals or is greater than the parts which you sold him, which entitle him to an incentive, is that right?

A Within product category.

Q So that you can tell since January of '72, you can tell whether any of your dealers by product category is claiming more by way of incentive allowance for wholesale sales than he has purchased from you in those product categories, am I right?

A That is correct.

Q And you do that, do you?

A It's another activity.

Q And that is done with regularity, is it?

A I can't speak to their schedule, I don't know.

Q But it's available just by the forms which are

submitted by the dealers now, is that true?

A I t can be done.

Q Even before 1972, you had a system where you could audit the books of account of each of your dealers, right?

A Yes.

Q When you desired to, you did do that, did you not?

A Yes.

Q And the occasions when you did that is when you suspected a particular dealer was conducting some kind of irregularity in his business, isn't that right?

A Typically, yes.

Q And on such an audit, your auditors in examining the books and records of one of your dealers could ascertain from whom they were buying their crash parts; isn't that so?

A No. I don't believe there was a way for them -- again, I am not an auditor. I don't know how an auditor would be able to track that.

Q Aren't you aware there would be invoices accompanying sales and that there would be accounts receivable ledgers which would be looked at in any audit?

THE COURT: I would assume that if an auditor

went into a Ford dealer and was given access to the books and records, they could go through the invoices for the purchases of crash parts and find out whether those parts were being bought from Ford or from FLM or from another Ford dealer. I will take that as a given.

MR. JULIEN: As a matter of fact, it was done here.

THE COURT: But there are two things you might as well face. It is a different step from the step which he described just now as being established under the January 1972 procedure, because there the step as he described it only contemplates checking. The wholesale incentive allowance claims made by the Ford dealers who are claiming those incentives and that is one problem, and the other problem which we are talking about is the other Ford dealer who isn't claiming any incentive allowance from Ford, he has just bought at the reduced price from another Ford dealer or from an intermediary. That is another problem.

I don't think we have to labor this. I would assume that it could be checked, but I would also assume that it would entail some additional auditing or checking over and above what he has described to me as the January '72 procedure. Maybe that is the beginning and end of it,

but it would require some checking if they wanted to check it and if they had the right to check it and it might entail some more expense.

THE WITNESS: Would your Honor want an explanation on that? A typical Ford dealer might do 7 percent of the crash parts he would buy from us he would use in his own shop and let's say he would wholesale 30 percent. The mix of crash parts he would buy I really question whether an auditor could go in and determine of the crash parts he wholesales versus those he used in his own shop as to whether or not he did in fact.

THE COURT: I think it could be checked.

If you were able to go in on two occasions and check FLM's books and find out who they were selling to.

THE WITNESS But who the dealer bought from is the auditing problem.

MR. JULIEN: They checked that too.

THE WITNESS: This was one of the strong reasons for changing our wholesale incentive claiming system so we would have that ability to track better.

Q In '69 and in '70, in ascertaining that FLM was not one who was purchasing from one dealer and selling

to another, you checked their purchases, didn't you?

A You are speaking of whose purchases?

Q FLM's purchases.

A We checked FLM's sales, as I recall.

Q You also reported, the summary of report told you that they were not acting as a conduit between one dealer or another so you had to check their purchases to establish that too, did you not?

A I don't specifically know.

Q At any rate, since 1972, as a result of this system you have set up, you do have this means simply on the reporting system employed by your dealers, do make checks in categories with respect to the incentive wholesale allowance and where more is being claimed than purchased from you?

A Yes.

THE COURT: We have had that.

Did you ever consider ways to verify whether a wholesaler in the position of FLM was in fact violating the policies by selling to other Ford dealers or to insurance companies or things like that? Did you ever consider whether there would be measures to check that and control the short of simply shutting them off or cancelling the incentive discount for sales to them?

THE WITNESS: I have no specific recall on that.

THE COURT: Of whether you even considered it?

THE WITNESS: The subject was considered from so many angles for such a long time, I am trying to be accurate in my recall and I cannot come up with any specific alternatives I looked at that said we could do this or this or this and I think that is the type of recall I would have to have to be able to say yes to it.

Q Insofar as the documentation that counsel for Ford has shown you, and I refer to Exhibit V where you had phases listed and discussions had with respect to what you were intending to cure, there is no entry anywhere indicating that you were considering anything less severe than a cutting off of independent wholesale dealers, isn't that so?

A I believe there was a reference. I think No. 4 says establish a system to pre-approve wholesale customers and identify these customers by a code number.

Q Then what you wanted to do and what was in comtemplation at that time was that you, Ford, would pre-approve wholesalers, independent wholesalers to

whom your dealers might sell crash parts?

MR. MAC CRATE: Objection. The first part of the question is totally unsupported.

THE COURT: It's just a question. If it's wrong, the witness can answer.

THE WITNESS: Would you restate the question?

MR. JULIEN: May it be repeated?

(Question read)

A It wanted to do part, it was just another consideration we were looking at. As far as wanting to do, we look at a lot of things.

Q I am talking about this thing.

Q That was under consideration.

Q That is, approving in advance who the independents were that they would sell to.

A That was under consideration.

Q One of the ways that was at that time, under consideration is a means of checking both purchases and sales by those wholesale customers was simply to afford them, after you approved them, a code number; right?

A I just recall what is on there. Establish a system to pre-approve wholesale customers and identify these customers by a code number.

THE COURT: I think we will have to recess

now.

As I said last week, I have today to give to the case and I have other trials scheduled this week.

How long do you gentlemen estimate the case will take to complete?

MR. JULIEN: It's with my friend. I think his estimate would be more acceptable than my own.

MR. MAC CRATE: I believe we could complete in two days, your Honor.

THE COURT: The only time I have two days is next Monday. I thought if it was going to be about another half day, I could work you in and just keep going tomorrow morning and have the other trial wait, but if it's going to be two days, I think we will just have to adjourn it until next Monday.

MR. JULIEN: Have you any alternative dates? I am already committed to the selection of a jury and a trial of a case.

THE COURT: It's a very difficult situation. I think the case has gone a lot longer than it should have gone.

MR. JULIEN: I will have to make arrangements.

THE COURT: Fortunately I have that couple of days open.

MR. JULIEN: I am considered engaged here.

THE CLERK: October 7th at 10:00 o'clock in the morning.

(Court adjourned at 4:45 p.m. until October 7, 1974 at 10:00 o'clock a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
David Wasser (Resumed)	372	385	443	
Morris J. Rowlands	461	524		

EXHIBIT INDEX

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Plaintiff		
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FLM COLLISION PARTS, INC.,

- against

FORD MOTOR CO. and FORD MARKETING CORPORATION.

October 7, 1974

10:00 a.m.

[Trial resumed.]

M O R R I S J. R O W L A N D S , resumed.

THE COURT: Okay.

CROSS-EXAMINATION [continued]

BY MR. JULIEN:

Q Mr. Rowlands, you recall that one of the things you were questioned about when last we met was the wholesaler function; you remember that.

A Yes, sir.

Q Before July of 1971, when FLM was eligible, when it moved down merchandise from your dealer to retailers, it was then providing a wholesale function; was it not?

MR. MAC CRATE: Objection, your Honor. The question includes the statement that FLM was eligible. There is nothing on the record to support that statement that FLM was eligible.

THE COURT: What time are you talking about?

MR. JULIEN: This is before the cutoff. Mr. Rowland himself --

THE COURT: Before the change of policy?

MR. JULIEN: Yes.

THE COURT: Okay. Objection overruled.

How can you object there, Mr. Mac Crate?

MR. MAC CRATE: Your Honor, the wholesale incentive was never offered by Ford to FLM. It was never to receive the wholesale incentive. Therefore, it was never eligible for the wholesale incentive.

THE COURT: Well, I guess what you mean to say is when a Ford dealer's sales to FLM was eligible --

MR. JULIEN: Yes.

THE COURT: -- for the discount. Why don't you phrase your question that way?

MR. JULIEN: I will put it that way. We had it that way both in his testimony and in the deposition.

Q At the time when FLM was an eligible customer so that the dealer received the incentive for sales to that; you have that in mind, do you?

A Yes.

Q That is before the cutoff; you understand that?

A Prior to July 1971.

Q Right. Now, at that time, when it transferred goods from the dealer who sold it down to the retail level, it was then performing the function of a wholesaler,

was it not?

A When FLM sold goods to a retailer, it performed a wholesale function.

Q Yes. And that was the same function it continued to perform after the cut off, isn't that correct?

A That's my understanding.

Q Now, this wholesale incentive which your company provided to its dealers was, in the judgment of your company, one of the things necessary so that the dealer, when operating as a wholesaler, would receive certain additional benefits, making it profitable to operate as a wholesaler, right?

A To enable him to compete --

Q Yes.

A -- at a profit, yes, sir.

Q Thus you did have in mind that in order to compete as a wholesaler this incentive was necessary, right?

A Yes, in the total scheme of our wholesale incentive program.

Q Now passing to the next point, you recall that counsel took you over the six phases which are delineated in Defendant's Exhibit U, which was a report of one of the meetings you had been having with others fixing this

new policy back in 1970, right?

A I don't believe this is a report on a meeting. This is the report we discussed last. I don't think it was the report of a meeting.

Q Well, I understood you to say, but correct me if I am wrong, that this particular exhibit, when shown to you by counsel, is typical of the kind of reports that either emanated from or were part of your meetings when you were fixing policy.

A It is the type of document we would have to hold a meeting with.

THE COURT: What is the exhibit number?

MR. JULIEN: U, your Honor, Defendant's Exhibit U.

Q Then I asked you about Phase Four, which, just for continuity sake, your Honor, reads, "establish a system to pre-approve the wholesale customers and identify these customers by a code number." And you said that Phase Four was never implemented by the company, is that right?

A That's correct.

Q Now, alongside of that, showing status, appears, with respect to Phase Four, "The discussion during the January 22, 1970 meeting with Mr. Page developed a need"

and so forth. Do you have any document showing the meeting with Mr. Page on January 22 of 1970?

A None that I can recall.

Q And would you be kind enough to tell his Honor who Mr. Page is?

A Mr. Page was our marketing manager and then became our general manager.

What was that date again? That was in January --

Q January 22, 1970.

A 1970? He would have been our general manager, I'm quite sure, at that time.

Q This idea of pre-approving wholesale customers, did it emanate from you?

A No, it did not.

Q Well, were you the one who decided not to implement this idea of pre-approving wholesale customers?

A I don't recall it ever coming up for a formal decision.

Q Well, there were discussions on the subject, true?

A Yes, there were discussions.

Q And who was it that decided not to further that project of pre-approving wholesale customers?

A I don't know.

Q No records which would refresh you on that?

A None that I can think of.

Q When you gave us the other day your understanding of what the Federal Trade Commission had wanted with respect to the original wholesale incentive, was it your understanding as well, that the purpose with respect to the original creation of the wholesale incentive was that the Federal Trade Commission felt that body shops were not competitive with your dealers in the repair of cars with respect to crash parts?

A You used the term "original wholesale incentive" and that takes me to our original wholesale incentive. I need some points in time.

Q Please allow me to amend that question and have you understand I am referring to the 1969 wholesale incentive.

Now, wasn't it your understanding that Ford Motor Company was being asked by the Federal Trade Commission to also consider selling crash parts directly to independent body repair shops and to auto parts, wholesalers and jobbers? Didn't you understand that, too?

MR. MAC CRATE: Reluctantly I object to the form of the question because the wholesale incentive in 1968 applied to many things, and the limitation Mr. Julien placed on the question does not sufficiently limit the question.

MR. JULIEN: This is informational, if your Honor please.

THE COURT: I think there are some things that are confused and some things aren't. We are not talking about wholesale incentives on anything but crash parts. We're talking about the situation beginning in 1968. So let's not worry about the other subjects at other times. Let's have that understood; right?

THE WITNESS: I understand that.

THE COURT: Okay. Now, secondly, I don't understand -- did you think you got your first question answered?

MR. JULIEN: No, I don't think I have an answer yet. Your Honor recalls that the Court's rules were restricting the witness to his understanding the other day and now I am pursuing his understanding.

THE COURT: You went to a second question, and it said, also or in addition, and I didn't think we had an answer to the first question.

MR. JULIEN: Shall I start again?

THE COURT: You start again and understand we are only talking about crash parts and wholesale incentives beginning in 1968.

Okay, go ahead.

Q Wasn't it your understanding that the Federal Trade Commission was asking the company as well to make direct sales of crash parts to independent body repair shops and to wholesalers and jobbers servicing such body repair shops?

A It was my understanding that they wanted us to make sales direct to independent repair shops; it was not my understanding that the FTC wanted us to make direct sales to wholesalers.

Q Well, in the year 1969, in November of 1969, weren't you further importuned by the Federal Trade Commission to sell crash parts to independent repair shops as well as auto parts, wholesalers and jobbers serving such body repair shops? Weren't you?

A I don't have that recollection. I do recall that in the fall --

Q Excuse me.

THE COURT: Let him finish his answer.

A I do recall that in the fall of '69 that we

did communicate to our dealers that FTC was not pleased with the way our program was going.

Q And is 9 for identification and the letter accompanying it the manner in which you communicated [illegible] your dealers in November of 1969?

A Yes.

MR. JULIEN: Offer it, your Honor.

MR. MAC CRATE: I object, your Honor, to the admission of the enclosure for the truth of the matter asserted on the grounds of hearsay.

THE COURT: Let me see the exhibit, please.

(Document handed to Court)

THE COURT: Mr. MacCrate, are you going into the communications between the Federal Trade Commission and Ford? Are you going into that in some detail? So far we have had allusions to that subject, but not real comprehensive review of it. Are you going into that?

MR. MAC CRATE: Your Honor, it would depend upon your Honor's ruling in this respect.

THE COURT: I don't think it should depend on it. I understood you were making as part of your case -- you were urging that the genesis of the November '68 of the wholesale incentive was the request for urging of the FTC and so that's part of your case, isn't it?

MR. MAC CRATE: By way of explanation, your Honor, I have in my hand copies of four letters exchanged between Ford and the Federal Trade Commission in July and August of 1968. It is the precedent correspondence to the document that is the subject of the present objection. This material was subpoenaed by the plaintiff and we have had it here in court.

I would withdraw my objection with respect to the proferred exhibit at this time if these four earlier letters were received in evidence, and I believe that that would place the entire matter in context.

THE COURT: What about that, Mr. Julien?

MR. JULIEN: I haven't seen these documents before, but I seem to recall another document that accompanied them. But may we defer this for the time being so we can check out on it.

THE COURT: I don't understand why you haven't. I don't really understand with all the pre-trial we had.

MR. JULIEN: Never got it.

THE COURT: I would think that the correspondence between Ford and the Federal Trade Commission should come in. I would think obviously it is not a legal defense, so to speak, that the Federal Trade Commission makes an informal request or says something informally,

but it does seem to me it is part of the factual background and if there are questions about Ford's intentions or state of mind or anything like that, why, obviously the position of the FTC and communications between the FTC and Ford would be relevant on that, but I think the whole business ought to come in.

So I am just going to go ahead and I will admit Exhibit 9 and I will say right now that I will admit -- you know, unless they run into the thousands of documents or something -- I would admit the correspondence in its entirety between the Ford Motor Company and the Federal Trade Commission on the subject we are talking about.

So I will admit Exhibit 9 and when and if you want to -- I assume you are going to offer the other documents and I will certainly admit them.

MR. MAC CRATE: May I simply identify them briefly on the record.

THE COURT: Why don't you just wait. You wait until you want to offer them.

Exhibit 9 is received.

(Plaintiff's Exhibit 9 was received in evidence)

THE COURT: I hate to interrupt, Mr. Julien,

but there is something I may forget.

XXXXXX BY THE COURT:

Q When Ford changed its policy in June or July of 1971, it had in mind the problem which we talked about a few days ago about control.

Do you remember that?

A Yes, control of wholesale incentive payments.

Q And that control problem related to the possibility that a company like FLI would buy these parts, and that it would have the incentive passed on to it, and then it would resell to Ford dealers passing on to them the wholesale incentive benefit, right?

A That's one of our concerns, yes.

Q And I asked you at some length about whether there was any other control problem except the problem of reselling to other Ford dealers, and I think the only thing you mentioned was the possibility of selling to perhaps insurance companies.

A Yes, we were identifying other ineligible customers and the insurance companies as well.

Q Was there any other reason for changing your policy in July 1971 besides the control problem which we have discussed?

A Yes, your Honor.

Q And what was the other reason or what were those other reasons?

A One other reason was we were paying a wholesale incentive to a dealer who did not perform the function, and this -- we are in a dual channel system, we sell to distributors as well as to selling Ford and Lincoln-Mercury dealers and by paying a wholesale incentive to a Ford or Lincoln-Mercury dealer when they did not perform the function put in jeopardy the whole integrity of our dual distribution system.

Q I can't -- integrity and jeopardy and every - thing you have got to be more concrete.

Was that the only other reason or was there a third or a fourth reason?

A That would be the other major reason.

Q Well, I don't care whether it's major or minor, I want to know all the reasons that you changed your policy in June or July of 1971.

A It would split into two, the one which I can clearly say, paying wholesale incentive to a Ford dealer when they did not perform the function; that was a second concern; the third one was that by definition, when a business entity sells to a wholesalers, he has performed the distributor function. So, we were concerned that

when a Ford dealer sold to a wholesaler, he was in effect, or he could argue, that he performed the distributor function, not the wholesale other function, and that in the case of our Motor Craft Autolite branded parts, we sell the identical Motor Craft Autolite parts to dealers as we sell to distributors. So we would have a distributor selling to a wholesaler and owning the part at a lower acquisition cost than a dealer selling the identical part, which could conceivably be to the same wholesaler and owning a part at a higher acquisition price.

Q Now, wait a minute. I am lost.

Let's go back.

One of the reasons Ford changed its policy in the summer of 1971 was the control problem, which we have discussed, correct?

A Correct.

Q Now, what were the other reasons, or what was the other reason, just start again, please?

A All right, the second concern was paying wholesale incentive to a Ford dealer when they did not in fact perform the wholesale function. In other words, they did not move the goods down to the retailer level.

The third problem is the one we are having

our difficulty with here, and it is a little complex. Might I give this background to make sure that --

Q No, just define it.

What was the problem?

A We had Motor Craft branded parts which we sell to boat vehicle dealers and to Motor Craft distributors.

Q What do you mean Motor Craft, is that a trade name?

A Yes, it is, sir. We have approximately 1,000 Motor Craft distributors.

Q And what are their things called, Motor Craft parts?

A We have Motor Craft branded parts that are different than our Ford branded parts, and the --

Q What kind of parts are those?

A Things like filters, spark plugs -- our spark plugs are Autolite and then we have filters, shock absorbers, carborators, rubber goods, approximately eight fast moving lines.

Q So do I understand it, you have two brand names of parts, the Autolite parts and the Motor Craft parts?

A Those are parts we will sell to a Motor Craft distributor.

Q Are there still Autolite parts and are there Motor Craft parts; are they two things?

A Yes, they are. Autolite parts are limited to spark plugs only.

Q And the Motor Craft parts?

A Are covered by seven other lines. Now those Motor Craft Autolite branded parts, we will sell to a network of distributors, totally separate from our Ford and Lincoln-Mercury dealer organization.

Q Are these what Mr. MacCrate has labeled the direct account warehouse account distributors in his chart?

A Yes, your Honor. So we sell those Motor Craft Autolite branded parts to the direct account warehouse distributor, and his acquisition cost, being a distributor, is at the functional discount level of a distributor.

Now, we sell in addition to the Ford branded parts, we also sell -- the Ford branded parts we sell to Ford, Lincoln-Mercury dealers we also sell to Ford, Lincoln-Mercury dealers the Motor Craft branded parts.

Now, the difficulty we had is the Ford or Lincoln-Mercury dealer selling a Motor Craft branded part, say, to a wholesaler. He could argue that he had

performed a distributor function and that his acquisition costs from us should have been that of a distributor. But in fact, he does not have the qualifications of a distributor, we will not recognize him as a distributor, so, his acquisition cost is that of a wholesaler .

MR. JULIEN: Your Honor, I move to strike that entire answer. I understood that your Honor was referring to crash parts in his interrogation of this witness.

THE COURT: Motion denied.

Q Now, when FLM sells the Motor Craft parts to a warehouse distributor, then it is your understanding that he sells to a jobber-wholesaler?

A He must, in order to earn the distributor price from us.

Q And then that jobber-wholesaler will resell to what you call the retailers, the body shops.

A The gas station, independent garages.

Q Right.

Now, the warehouse distributor, he gets a discount depending on who he sells to, right?

A That's right. If the warehouse distributor should sell direct to a retailer, then he would not earn the re-distribution discount, and he would then get the

part at the wholesaler price level. This is the functional discount proposition.

Q In other words, if he --

A If he shouldskip past the wholesaler and sell directly to the retailer then his acquisition price from us would be at the wholesaler price level not the distributor price level.

Q All right.

Now, going to crash parts --

A Yes. We have the one system which we -- everything is contained in the one system.

Q In your crash parts distribution, you don't sell to warehouse distributors at all, do you?

A That is correct.

Q You sell only to the dealers, right?

A That's right.

Q And what was your concern if FLM was present in that distribution system as it was before June or July of '71?

A That would go back to the number one-- the number one concern of the intermediary, the possibility of goods passing from a Ford dealer to --

Q I am talking about this concern, the third problem.

A The concern here, we want one wholesale incentive system for our dealers. It is quite complex the way it is, and we did not want to add complexity by having one system for one brand of parts, another system for another, and another system for another, because we have --

Q Wait, you have got a separate system for your crash parts which you had before June and July '71.

Now, what was the third area of concern about crash parts?

A Your Honor, the wholesale incentive system we have applies to crash parts, our Motor Craft branded parts and --

Q I understand your system about Motor Craft, and I want to get to the crash parts.

A The main concern on the crash parts was that a dealer could sell to an intermediary and the intermediary then sell to another dealer who would use those parts in his own body shop and wind up owning them at a price lower than an independent body shop.

Q We covered that.

A And that covers all of our concerns, your Honor.

Q That's all the concerns?

A Those are the three we have outlined.

Q Let's pass the first, I want to talk about the third.

What was the third concern?

A That was the one I outlined with regard to the independent channel of distribution, and the functional discount, and paying when the function is performed and not when the function is not performed.

Q And you were afraid that the dealers selling to FLM who resold to a body shop would come along and say, I am really a distributor. I should get more than a wholesale discount; I should get something further.

Right?

A No, your Honor, that was not our major concern.

Q Well, all I am trying to get is a definition of your concern from you. What was your concern?

A Well, it goes back -- we are on the third concern, aren't we, the first and second one we're clear on.

Q I am not clear but at least I want to discuss the third concern now.

A Well, the third concern had to do with a Ford dealer selling to a wholesaler and then coming at us at some future date and saying, I performed a distributor function and you only gave me acquisition price of a

wholesaler.

Q That's just exactly what I said to you a few minutes ago.

A Except your Honor you related it to crash parts and our entire reference at that time was on Motor Craft-Autolite brands.

Q But you were afraid that somebody would try to come along and apply the Motor Craft-Autolite system to crash parts, right?

A That was one of the possibilities; that was not foremost in our minds, however.

Q In other words, the third concern was not the foremost?

A Not related to crash parts, no, sir. The first concern was foremost as it related to crash parts.

Q Let's see if we got it.

Let's use these as our definitions.

The first concern was the concern that a person like PLM would sell the parts and give the benefit of the wholesale discount to other Ford dealers or to other so-called ineligible customers like insurance companies, right?

A Yes, your Honor.

Q The second concern was that Ford dealers were

getting the wholesale incentive discount when he wasn't really performing the wholesale function, right?

A Right.

Q The third concern was that the Ford dealer who sold to PLI who resold to a body shop, that Ford dealer might come at you and say, I want to have more than a wholesale discount; I want a distributor's discount.

A No, sir, that was not concerning us at that time. That third concern strictly related to having a uniform policy in making sure that Motor Craft-Autolite brand merchandise was contained within that uniform policy. You see it is only when we get into these second channels of distribution that the third concern troubles us.

Q Was anybody making a claim that you were trying to disturb your system of distributing Motor Craft and Autolite?

A Yes, sir, we did have some dealers selling Motor Craft-Autolite to wholesalers.

Q In other words, concern number 3 wasn't really a concern about crash parts at all; it was a concern that arose from Ford dealers selling Autolite and Motor Craft parts to wholesalers and telling you

they wanted a distributor's discount, right?

A That was the third concern. Our language permitted them to sell Motor Craft parts to wholesalers and collect wholesale incentive.

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Q So that third concern had nothing whatever to do with crash parts or FLM, right?

A Only insofar as one policy for the entire wholesale incentive system.

Q All right. In other words, you wanted to have one policy --

A That's correct.

Q -- to cover the wholesaling function and the wholesale discounts for all the parts.

A Yes. That has been our policy, of having one policy to cover the entire wholesale incentive program.

Q Now let us go back to the second concern, that the dealer wouldn't be performing the wholesale function. What, from a practical standpoint, is that concern? Is it just a matter of artistic, theoretical matters or is it some practical --

A I guess it is from a standpoint of trying to have your policies kind of neatly tied together and making sense with your intent. In other words, if you take the position that by definition wholesale is moving it from the wholesaler level to the retail level, then your language should be written so that that's the way it is understood, and we just felt that our language was just not sufficiently tight enough, that it should be

stated the way we intend to administer it.

Q Let me ask you something which may be hypothetical, but try to answer it if you can.

Let's suppose that a device could be arrived at to completely solve your control problem without undue expense -- I mean without any expense, extra expense -- to Ford. In other words, let's suppose that you could be assured that FLM would not resell to other Ford dealers or to insurance companies but would only resell to body shops. Just assume that with me, will you?

A Yes. That it can be done at no cost to us.

Q And you wouldn't have any auditing bother. Let's assume the best of all worlds on that point. Right?

A Right.

Q Now, can you tell me if Ford would have or would now wish to deny the wholesale incentive allowance to Ford dealers reselling to FLM?

A Under what you just outlined, absolute control and no cost, that would make all of our concerns go away. We would not have a problem then.

Q I don't want to trap you, because we've talked about --

A You have made some very specific qualifiers there.

Q Okay. Let me make sure you understand me, because I don't want to mislead you in any way. We've talked about three concerns, right? You understand? I mean, you've told me about three concerns.

A Yes.

Q The reason for my question, Mr. Rowlands, was that you indicated pretty strongly that the first concern about control was the major concern in --

A As related to crash parts.

Q Yes. And so what that led me to, frankly, was to ask you the question in the way I did, because I'm not trying a case about Motorcraft parts or Autolite parts, I am trying this case about crash parts and FLM. So I just want to ask you again,

Assuming that a device could be arrived at where your control problem would be solved without any cost to Ford, then would you then or would you now wish to deny the wholesale incentive allowance to Ford parts sold to FLM?

MR. MAC CRATE: Your Honor, I am constrained to object.

THE COURT: Just a moment, please. I don't want any counsel interrupting at this point. This is my question to this witness.

A It would leave my number two concern still unresolved. You used the words would we wish to. No, we would not wish to.

Q Well, just explain yourself. You get my point?

A Yes, I do.

Q Okay. Just explain yourself.

A And the reason I state that we would not wish to is, we have a dealer network of 6,700 dealers, and part and parcel of their dealership operation is to be both retailers in parts and also to be parts wholesalers. We do a lot of work with them to make them good wholesalers, provide the service.

We feel that they are very capable of doing this. We want our dealers to be profitable as related to, say, the GM organization and the Chrysler organization. To the extent that we would have a policy that would encourage or make it very easy for them to transfer the actual function of the wholesaler to someone else, we would be really weakening our dealer organization; we would be giving up something that we really are very well equipped to do, have established the investments in place to do it, the facilities, and we would really be encouraging our dealers to not take advantage of one of the things that helps make them profitable, helps make

the Ford franchise competitive with the GM and the Chrysler franchise. It would really not be to our best interests.

Q To have them selling to FLM at small markups.

A Yes, selling at small markups and having someone else performing a function that they are perfectly capable of doing, the function that we encourage them to do and the function that I have quite a number of people and expense of trying to help them do it.

Q So you are saying that even if you could completely solve the control problem, you would still have concern number two.

A Yes, and the business concerns I just outlined.

Q Well, that's all related to concern number two.

A Yes, it is related.

Q What do they do in performing the wholesale function? We've had a lot of talk about that, but that's still abstract to me. I want to know what they do. Do they advertise? Do they have special employees? Do they have special facilities? What does the Ford dealer physically and monetarily do in performing the wholesale function ?

A The Ford dealer who is actively wholesaling, the first thing he will do is he will have an inventory

to support his wholesale activity, which is totally apart from the kind of inventory level that he would carry to support his shop, his dealership shop.

So he starts out with an investment in parts over and above that which would be required for his back shop, his own shop within his dealer shop.

Q You mean his own repair shop.

A His own repair work.

3am Q So he has to have a facility and he has to have an inventory.

A That's correct.

Q Okay. Now, what else?

A And then the kind of service provided is primarily one for an independent garage, the people ordering parts for a crash job need assistance. They don't always understand our part numbers or our parts books, and they need assistance from an expert parts man who in fact order the proper parts for the crash job.

Now, this is done in a variety of ways. The real aggressive dealers will go out on site and help a man with it, and in many cases they will provide service of delivering the parts to them, again depending on the size of the shop and how much business they do with them. I would say --

Q So they would have employees paid to perform this kind of selling service, right?

A Yes. You don't normally have what you would call an outside salesman. It is a lot of telephone solicitation with independent body shops, a lot of work in contacting insurance companies. An active dealership working at the wholesale business and the crash business will be actively staying in touch with the insurance companies and the insurance adjusters.

Q If the Ford dealer sells to an insurance company, is that sale entitled to the wholesale incentive?

A No, it is not.

Q Why is that?

A Because our position is that the insurance company really takes the place of the consumer.

Q He is like the owner of the car.

A That's basically our position.

Q Well, what caused me to ask that is, these people to the extent that they are talking to insurance companies aren't wholesaling, are they?

A The only time that that would probably get into direct conversation would be if an independent shop was working with an insurance adjuster in working out what are we going to straighten out and what are we going

to replace it for. That entire consideration would become part of, you know, what do we order in the way of new parts.

Q In other words, if a car was being repaired at a body shop, the wholesaling Ford dealer might have to talk to the body shop and to the insurance company who was going to be paying for that body shop repair in order to talk about all these considerations necessary to the job, is that right?

A When you get right down to those kinds of conversations, I'm really starting to guess a little there, your Honor, because I just have not been privy to, you know, just precisely who is talking to whom at that level.

It just seems that when an independent body man is working out an order with a Ford dealership that there could be some involvement with the insurance adjuster.

Q Sure. Obviously that could be. But you are saying in general that there are people who perform this sales function, right?

A Yes. Typically a large wholesaling --

Q And they advertise crash parts?

A I'm hesitating because I'm sure that there might be some dealers who do it. But it is not a common

practice.

Q It isn't commonly advertised.

A It is mostly contacts.

Q Okay.

A It is personally contacting independent body shops.

Q What about credit? Do they give credit? Do they take credit risks? How is that handled?

A Yes, they do take credit.

Q Is there any standard type of arrangement that you know about as far as credit given by the Ford dealers to body shops?

A No, I could not state a standard to you. I'm sure that it varies widely between real big customers of long standing as opposed to small customers of short standing.

Q But the credit risks to the extent that it is given --

A -- is with the dealer.

Q -- is with the dealer.

A Correct.

Q And the decision about giving credit is with the dealer, is that right?

A Correct.

Q Now, when Ford grants the discount to the dealer, this so-called wholesaler incentive discount -- let me ask you this: How is the percentage arrived at and how does Ford determine the percentage of the discount and how does Ford determine what parts to give the discount on and what parts not to give the discount on?

A That question is strictly within the crash parts area?

Q Sure.

A Not beyond crash parts?

Q Let's take crash parts.

A There is quite a difference --

Q Let's take crash parts.

A All right. On crash parts, when it originally went in, it was 20%. I cannot tell you why they arrived at 20.

Q That was before you had anything to do with it?

A Actually I was there, but I still don't know why 20 was the number. I would --

Q What I'm getting at, frankly, is I would like to get an idea whether this incentive is in parts a compensation for services performed by the dealer for which he has to make expenditures in inventory, overhead - you know, physical facilities - wages and so forth, and

I was wondering if those cost considerations were taken into account in figuring the amount of the wholesale incentive discount. Can you answer that?

A I have never seen any calculations that would show that.

Q Have you ever been privy to any discussions of that?

A No, I have not.

Q Now, did there come a time when the discount on the parts it was being given on was raised from 20% to 25%?

A It went from 20 to, I believe it was, 23 and then to 25. I believe there were two steps.

Q When did it go to 23?

A I don't recall. I don't honestly recall. I just remember there were two stages. It started at 20 --

Q Do you remember when it went to 25?

A I think 25 was -- I'm guessing, but I think it was in the first quarter of 1970 or January of 1970.

3.4 Q All right. Do you remember why it went to 25?

A I remember -- I can generalize on that. I know there were two things that were on our mind at that time. The first was that the dealers did not appear to

be selling to the independent shops at the general trade price. So an additional discount, we felt, would assist in getting the dealers to sell at a lower price to the independent garage.

Q In other words, the dealers were trying to get really closer to -- a little too close to a retail price.

A In other words, our feeling is that the more wholesale incentive that we would give to a dealer, the greater the odds that the dealer would in turn to the independent garage at the general trade price.

Q At at real wholesale price, right?

A At the general trade price.

Q Well, --

A The general trade price, as you recall in the price book, is the same thing as dealer price.

Q And what is it? The recommended retail less 42%, or something?

A Less 40, at this time.

Q And they were charging more than that, right?

A Something more, yes.

Q Something more. And you wanted --

A Again, depending upon geographic area and dealer. Every dealer did it his own way.

Q But you took --

A We felt more discount would assist in obtaining that goal.

Q Well, did it have anything to do with their costs, or don't you know?

A At that particular time, I gave you one of the two things. The other one was that General Motors, as I recall, went to 25. If a GM or a Chrysler dealer has a wholesale incentive on a group of parts that exceeds ours, that makes that -- that gives them franchise value in dealer relations. So that was also part of our consideration.

Q You are not competing with General Motors on --

A We compete in a sense for --

Q You compete on other parts, don't you?

A On other parts. And we compete in a sense on desirability of franchise and the kind of dealers you can attract to your franchise, and you try never to be uncompetitive in any part of your business.

Q Okay. Now, but do you recall any considerations at any time about the cost to the dealers of performing what you call the wholesale function?

A I was never in on any discussion of that nature.

Q All right. Now, secondly, are there some parts on which the wholesale incentive allowance is not

allowed?

A Oh, yes.

Say that again. I'm not sure I caught your question.

Q Are there some crash parts on which no wholesale incentive allowance is allowed?

A Yes, sir.

Q Do I understand it is either the standard allowance of 25%, or whatever it was, or it is nothing?

A I think I'm correct. I believe it is all 25. It could be -- there could be a few in there that are not exactly 25. But basically that's what it is, 25 or nothing.

Q Basically the parts that qualify get the standard discount, and if they don't qualify they don't get any discount.

A That's basically it. That's basically correct.

Q Now, why aren't some parts included or qualified for the discount?

A The reason is that cars like American Motors , Volkswagen, Toyota, Datsun, all of those small, compact cars, they were never prevailed upon to place a wholesale incentive on their crash parts. So our feeling was that if we have a Pinto and a Capri selling against a Volkswagen

and a Toyota and so forth, that then, if they haven't prevailed on them to give wholesale incentive on crash parts, then we will not offer it either. And this was the basic reason why we did not.

Q I don't understand that. I thought the purpose of giving a wholesale incentive allowance -- well, let me go back.

If the purpose of giving the wholesaler incentive allowance was to let these independent body shops have a fair crack at the business and be competitive with your Ford dealers, then you in theory should be giving the incentive discount on all the crash parts regardless of whether Toyota does it or Datsun. Do you get me?

A Yes, I do. I can understand why you would have trouble with it.

Q But I guess the purpose is a little different.

A The reason we put it on the crash parts we did is because the FTC prevailed upon us to do it. We did not want to do it. We did at the urging of the FTC, and we went only as far as we felt that it was required to satisfy them.

MR. JULIEN: I have to move to strike that answer.

THE COURT: Just a moment.

A [continuing] They did not prevail on these other competitors of ours, and that would have given us a cost, a cost of doing business where we really would have been at a disadvantage in trying to compete in the compact market, selling against other manufacturers who had products where they didn't have the 25% wholesale incentive cost burden.

Q Did the FTC review with you the categories of parts that you gave or did not give the wholesale incentive allowance on?

A I was not part of any of those discussions. I don't know.

Q But was it your understanding that the FTC was going to Ford as well as other auto makers and prevailing on all of you to give some wholesale incentive discounts?

A It is my understanding, and I say understanding because I was not privy to the discussion, that the FTC was talking to Ford, Chrysler and General Motors.

Q And at least they didn't prevail on Datson, Toyota and Volkswagen.

A And American Motors.

Q And American Motors. So on the very small

cars, like Pinto, you didn't feel that you had to offer your dealers those discounts in order for them to compete and be an advantage or disadvantage vis-a-vis the Pinto, Datsun and Volkswagen dealers, is that basically it?

A On the compact cars, we felt that we were, you know, on a direct face-off with our competition.

Q As far as Ford was concerned, is it correct that -- I guess I'm not clear about the purpose in giving the wholesale incentive discount. If it was just to satisfy the FTC, then it wasn't your purpose at all. Your purpose was to satisfy the FTC, right?

A That's correct.

Q Would you be able to define for me, though -- I mean, did Ford -- can you do this much? What were the competitive considerations? Was it your understanding that in giving the wholesale incentive allowance you were benefiting the competitive position of -- well, I don't think the question makes any sense.

[To Mr. Julien:] Okay, you go back, if you can pick it up after all this.

MR. JULIEN: Before I do that, your Honor, may I respectfully move to strike out the answer of the witness to the effect that Ford was doing it to satisfy the FTC?

THE COURT: No. That's his understanding. We'll have it.

CROSS-EXAMINATION [continued]

BY MR. JULIEN:

Q From time to time there are changes with respect to which items shall receive the wholesale incentive allowance, right?

A Yes, sir.

Q And the determination as to which items shall be eliminated or which added are done by Ford, is that right?

A That's correct. Let me make sure I understood you properly. The parts that carry wholesale incentive or do not carry wholesale incentive are decisions we make.

Q Correct.

A Yes.

Q As to changes as well.

A Yes.

Q All right. And when a change is made referable to an item which previously had enjoyed the wholesale allowance and now is taken off the list, you do not file that with the Federal Trade Commission, do you?

A I don't know.

Q Have you ever seen, in your preparation for this case or any time in the work that you've done, have you ever come across, a single item which apprises the FTC of changes in your wholesale allowances?

A None has come to my attention.

Q Yes. And in addition to that, when first the wholesale incentive was created for crash parts, in '68, have you come across any document, any kind of writing apprising the Federal Trade Commission that some items would receive this incentive and some items would not, and specifying which would and which would not?

A I have not seen such a document.

Q You never heard of any such document, have you?

A I have not heard of such a document.

Q At the time of the change of your policy in June or July of 1971, referable to non-eligible customers for dealers asking for incentive wholesale, did you communicate that to the FTC, that you were eliminating or cutting down on the allowance available to wholesalers buying from your dealers?

A I am not aware of the FTC being apprised of that policy change.

Q Now, getting back to this inducement to dealers to operate on the wholesale level, crash parts are not

parts for which there is any kind of sales promotion conducted by your company, is that right?

A That's correct.

Q And you told us crash parts generally sell themselves, depending upon the incidence of crashes and their severity, is that right?

A That basically controls the volume.

Q But when you eliminate this wholesale incentive for the crash parts for your compact cars, you have then eliminated the incentive for your dealers to perform the wholesale function with respect to those parts, isn't that so?

A You are now using words that I used in explaining our overall wholesale incentive policy, and that was in the frame of reference to all of our wholesale incentive part from crash parts. In other words, I don't believe I took the position that we needed wholesale incentive to move crash parts. That was in the context of our overall wholesale incentive program.

Q I understood you to say to his Honor that your purpose in setting up these wholesales allowances in your crash parts was to induce your dealers to serve the function of getting these crash parts to the body shops at a better price, right? Did you say it?

A The way you are saying it is not -- if it came out sounding like that --

THE COURT: It really did not. I don't think that's a fair characterization of what he said.

Q Well, let's see if you can respond to this question, whether it is a fair --

THE COURT: I don't see why we have to ask him what he said. You have notes of what he said. Let's ask a different question.

MR. JULIEN: All right.

Q Which are your compact cars?

A Pinto and Capri.

Q And do I understand that with respect to crash parts, the major parts with respect to Pinto and Capri, you are not giving your dealers this wholesale incentive, is that right?

A That's correct.

Q And therefore, whatever purposed you to create the wholesale incentive with respect to some crash periods is entirely missing from the Pinto and the Capri, is that right?

A Can you word that a little differently? I'm not sure what I would be answering there.

THE COURT: He has already answered that.

MR. JULIEN: All right.

THE COURT: Let's take a short recess.

I would like to pose this question to you, Mr. Julien. I've read the briefs that have come in so far. I've gotten some help, certainly from them, but one thing that puzzles me about your position is this, and I'm not quite sure how to phrase it. But let me try it this way:

You and your client to have the benefit, at least as one alternative relief you want to have the benefit, of the wholesale incentive discount as granted before the summer of 1971, right?

MR. JULIEN: Yes, sir.

THE COURT: Okay. And you argue that to give a discount, as is being done now, depending on whether a dealer does or does not sell to FLM is a violation of Schwinn, right?

MR. JULIEN: That's true.

THE COURT: Now, if you go back before June and July of 1971, where you would like to have us go, don't you there have a violation of Schwinn? In other words, if you are going to say that it violates Schwinn to give a discount depending upon who the part is to be sold to, don't you have that kind of violation beginning

in November '68? Because beginning in November '68 you have the granting of the discount made dependent on whether the part is resold to somebody like FLM or an independent body shop as distinct from being resold to the car owner as part of the repairs.

Now, maybe I am worrying too much about logic, but I think we have to worry about logic. It seems to me that the logical -- it doesn't seem to me; the problem is presented in my mind as to whether the logical conclusion of what your position is doesn't mean that you have to declare illegal the wholesale incentive plan that existed between November '68 and June of 1971.

MR. JULIEN: Do we not do that, your Honor, in that phase of the case where alternatively we do state that the system of distribution which eliminates a bona fide wholesaler and jobber is improper? You will recall that in our list of damages we appended, under one section, an assessment of what we were caused to expend as a result of having to pay the dealer an additional writeup, whether it is three or five per cent, and this is an item of damages. So we do indict the entire --

THE COURT: Don't go so fast. You have two alternative claims. One is that you should be permitted

to deal with Ford directly.

MR. JULIEN: Yes.

THE COURT: Okay. Then another alternative claim is that you should be permitted to get the same -- another alternative claim is that a Ford dealer who sells to FLM should have the same discount as the Ford dealer who sells to the independent body shop; right?

MR. JULIEN: Well, that the independent body shop I believe is on the retail level.

THE COURT: Wait a minute, maybe I don't understand you at all. One claim of yours is you should be permitted to deal directly with Ford.

MR. JULIEN: Yes.

THE COURT: And of course if you were permitted to deal directly with Ford, all this discounting problem about intermediaries would be out the window.

MR. JULIEN: That's correct.

THE COURT: But Ithought also as an alternative, you were claiming that if I have to deal with the dealer, the dealer who sells to me should get a wholesale incentive discount so he can pass it on to me.

MR. JULIEN: That's right.

THE COURT: Right?

MR. JULIEN: Yes.

THE COURT: Now, that brings me to the problem I mentioned a minute ago: The wholesale incentive discount

as it existed during the time that you claim was favorable, that is, November '68 to June '71, that involved a differential in price, did it not?

MR. JULIEN: To us?

THE COURT: No, to the dealer. The price that Ford charges to the dealer, that's the whole problem, when you are talking about price, the whole question is the price charged by Ford to the dealer.

MR.JULIEN: Yes. I am not quite clear as to what you are referring to as the differential during that period.

THE COURT: Yes, there was a differential during that period depending on whether the Ford dealer resold to we'll call him the repair customer, the car owner, and or -- on the one hand or whether the Ford dealers sold wholesale to FLM, to the body shops and so forth; right?

MR. JULIEN: Yes.

THE COURT: Now, if you're going to says that's a violation of Schwinn to make the eligibility for discount depend on who the dealer resells to, don't you have a violation of Schwinnin existence from November '68 through June '71 just as much as you have from June '71 on?

MR. JULIEN: There might indeed be, your Honor.

But have in mind that ours is a case in behalf of a single client having no class action limited involved, and consequently, it appears to me that that knowledge which enures to our client is all we need claim about, and if we need complain about, and if we select, as we do, our damage as eminating from the change in policy which destroys the incentive allowance when we are the customer, I think that that's all the damage we need to claim.

THE COURT: I wonder, don't you have to have -- you are asking for an injunction, and let's think ahead. Let's assume you -- and assume you were proposing an injunction to me -- now, I would like to know, and I am very keenly interested in it, and I am interested in it right now as to whether you would propose an injunction which would require Ford, number 1, to grant a wholesale incentive -- now, wait a minute.

If you are going to require a whole incentive and allowance to be given on sales to your client, it necessarily presupposed the existence of a wholesale incentive allowance.

MR. JULIEN: Yes.

THE COURT: Now, so, you have to be interested, it seems to me, in the legality of the wholesale incentive allowance per se, and if the wholesale incentive allowance

is illegal,because it violates Schwinn to have even a wholesale incentive allowance, which is not given to the repair customer, then you don't want me to decree such an allowance to be given to your client, do you?

MR. JULIEN: I don't understand, if your Honor please, that contained within the ambit of the issues of this case, that you are called upon to make a decision as to whether or not the wholesale allowance is permissible or not. This is not an issue in this case. I don't see it as an issue. It hasn't been posed either by the pleadings or the order.

THE COURT: I think we have got to think to the end of the road.

MR. JULIEN: All right.

THE COURT: Now, what form of decree would you say you were entitled to?

MR. JULIEN: All right, I am going to take it two ways.

THE COURT: All right.

MR. JULIEN: Now let's assume we get the broader relief from the Court, which says that we are entitled to purchase directly from Ford. This I see as posing no problem at all so far as decree is concerned.

THE COURT: Let's assume for the minute --

well, you were starting ahead. You go ahead.

MR. JULIEN: I think it's the second alternative that perhaps your Honor is asking for some thought from me about, and that is, if we claim, and we are given relief on that branch of the case only, which deals with what we claim to be our right to enjoy the wholesale inventory -- wholesale incentive allowance, then in such instance the decree could be fashioned as follows: That Ford shall afford its dealers the same wholesale allowances which it provides generally for such sales which such dealers make to FLM. This would include, of course, the wholesale incentive.

THE COURT: All right. Now, it is implicit in that that Ford has got a wholesale incentive allowance, and by granting that kind of a decree, this Court is certainly indicating that that is a legal thing. I mean, I wouldn't be granting a decree that directed Ford to do or permitted Ford to do an illegal thing. Right?

MR. JULIEN: Your Honor, neither party has addressed itself, nor perceived that the issues of this case included any illegality concerning the wholesale allowance, for example, defendant does not stand before the Court and say, Oh, we are going to discontinue it because we understand it now to be illegal, nor does the

plaintiff stand before the Court and say, I am not enjoying what they are giving to the others, but it is illegal to give it to anyone.

Now, nobody has addressed themselves to that problem.

THE COURT: But I have got to worry about it. Let's turn and look at the other face of the coin. If you once assume that Ford can legally grant a wholesale incentive allowance of the kind granted from November '68 to June 1971 -- I keep fudging on the date. When was the policy changed?

THE WITNESS: I believe it was effective July 1, '71, I believe was the effective date.

THE COURT: All right, until July 1, '71.

Let me start over.

If we once assume that it was legal for Ford to give the kind of incentive allowance it gave from November '68 to July '71, on the terms it then gave that allowance, it seems to me that we have got to worry about some logical conclusions from that.

If that situation was legal, was it not legal because of the very argument that Ford is now making, that is, that Ford can vary its price depending upon the function that the dealer performed, whether the dealer was

performing the retail function in repairing cars, in selling the parts to the car owner on the one hand, or whether the Ford dealer was performing a different function, that is, a wholesale function on the other hand.

If we once assume that, we assume that Ford can vary its prices and its discounts, depending upon function, then is not Ford able to make further refinements and variations depending upon function, and is not Ford at liberty to say, "Well, when a Ford dealer is selling to a body shop, that Ford dealer is performing a different function than when the Ford dealer is selling to FLM, and we, Ford, are at liberty to vary our prices and our discounts depending upon function. We have already done it in one way beginning in November '68; we are going to do it more accurately now."

What I am doing, Mr. Julien, and I think this is a very serious point to me: Ford's position, it seems to me, basically stands or falls on this question of whether they can vary their price and their discounts depending upon the function performed. I think the control question that is not really much of an argument but the question of the function, that theme has gone through all the Ford dealers andit is a very strong theme

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in some of the testimony and I think that we have got to analyze that very carefully.

MR. JULIEN: I can respond to that.

THE COURT: And I think that -- I can't take this, the situation beginning in July '71, in isolation. I just can't take it that way. I have to consider the logical implications of giving any kind of a price differential or discount depending on function, so I have to consider the logical implications of what went on before July '71 and I am afraid I have to consider the implications of -- I mean, this whole problem of whether you can give a price difference depending on function.

Obviously, whatever ruling I would make on that has implications outside of just the crash parts area and outside of just FLM. It is a question of law we have got to be concerned about.

So we will take a break. I wanted to -- I had given some thought to that problem.

MR. JULIEN: Would you like me to address myself to it now?

THE COURT: Sure and then we will take a short break. Obviously this will be the subject of further discussion.

MR. JULIEN: You see, in the first place, when they want to differentiate between their customers, that is, the dealers, this perhaps might be permissible.

THE COURT: Why is that permissible but the other not?

MR. JULIEN: Because Schwinn says so, it's just that simple. Schwinn says once your customer has his goods you may no longer exert control. That's why your question about who stands the credit risks was so important . Once your customer has the goods, you are through. You may not mandate any further from that point of distribution on. And however they market, and however they do it, it's perfectly plain that what they are doing is, they are saying, "Mr. Customer, it is true you bought the goods and you own them and you have complete control,but if you take those goods and sell them to FLM, what would have been your price wholesale is not going to be your price."

Now, that's essentially it.

THE COURT: I am not with you. We will take a recess. Obviously, I am posing a question. I don't expect an immediate response.

(Recess)

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THE COURT: Go ahead, Mr. Julien.

BY MR. JULIEN:

Q Now, sir, with respect to the Federal Trade Commission and what it may have had in mind respecting General Motors, you have no personal knowledge of that at all, do you?

A No. All second-hand knowledge.

Q And what action, if any, was taken with respect to any other manufacturer of motor cars, you know nothing about that?

A Well, I do know that the other compacts --

Q What --

A That's my own knowledge I know from the marketplace that those other compacts Toyota, Datsun, Volkswagen, American Motors, that they did not put wholesale incentive on their crash parts.

Q But you know nothing about the Federal Trade Commission's consideration of that problem with respect to Datsun, Volkswagen, or anyone else?

A No first-hand knowledge.

Q Now, with respect to your system of distribution where, what you described to his Honor before, you have a separate system of distribution with respect to your Autolite parts.

A Autolite-Motorcraft brand parts go through an independent channel.

Q And there the independent channels are independent warehouses and independent jobbers and independent wholesalers; true?

A The chart there, they would be the direct account, warehouse distributors, and the jobber-wholesalers on down through the retail.

Q Jobber-wholesalers are independent jobber-wholesalers; are they?

A Yes, they are in an independent channel.

Q So that these two systems of distribution even now are dissimilar, are they not?

A I am not sure I know what to understand by dissimilar.

Q They are not the same methods of distribution, true?

A They are all in the one functional discount structure.

Q With respect to the permission or the employment of independent houses to job and wholesale, in the one distribution channel, and not in the other, they differ, do they not?

A I am not sure I understand your question.

THE COURT: I think it's plain. The chart shows. I think he's testified that on parts other than crash parts there is competition with other companies, spark plugs, filters, et cetera, and they have different -- the chart shows the differences.

Q All right.

Well, back in '70, you knew that FLM was performing this wholesale function and that it was competing in this field in crash parts, you knew that, didn't you?

A I knew they were performing a wholesale function.

Q You knew they were competing in the wholesale field, didn't you?

A Yes.

Q And you told his Honor that one of the things that is desirable in the wholesale function is that an inventory shall be maintained -- do you remember saying that?

A One of the costs of being in the business.

Q You knew that FLM maintained an inventory, didn't you?

A I did not know about FLM's operating.

Q Well, you read the audits, two years of audits

with respect to it.

A I have many audits over my desk, Mr. Julien, and I have no recall of having any knowledge of what FLM's inventory might or might not be.

Q I am not asking about your present recall. I said that when you read their audits you were aware they were doing a substantial wholesale business and you knew they were maintaining inventory, at that time you knew it?

A I repeat again, at the time I read the audits, I have no recall of any impression as to inventories.

Q Well, at any rate, if one wholesaler can deliver parts faster than another, this is an element of competition, is it not?

A Yes, sir.

Q And assuming, just as a hypothesis that FLM was able to make deliveries of desired parts faster than your franchised dealers in that area, this would be a competitive matter, would it not?

A Yes.

Q And also as a hypothesis, assume that FLM was giving advice and assistance to the body shops with respect to the parts which will be needed, and that they were available for that kind of thing, more than some of

your dealers in the area, that too would be a competitive measure, would it not?

A That was another hypothesis.

MR. MAC CRATE: Objection, your Honor, there is nothing in the record to support the hypothesis.

MR. JULIEN: Yes, there is.

THE COURT: Overruled. He's answering a hypothetical.

A As a hypothesis, the answer would be yes.

Q By eliminating a wholesaler like FLM, you leave no wholesalers in the field other than your own dealers, isn't that true?

A You say by eliminating. All we have done is eliminate the wholesale incentive payments.

Q Yes, but if the destruction of wholesale incentive makes it unprofitable for a wholesaler to continue in crash parts, you leave the field to just your dealers, don't you?

THE COURT: These questions are all just argumentive. They are not getting to the point.

MR. JULIEN: Excepting, if your Honor please, I urge upon the Court that there is ample in the testimony here and in the documents to indicate that the elimination of FLM was one of the things that they were thinking of

at that time. This witness has admitted.

THE COURT: Mr. Julien that's beside the point. Do you have any cross that will bring out additional facts, but these are just argumentive question, conclusory questions. Really, I can get that in legal argument.

Q You never had any claims or any complaints that FLI was selling to insurance companies or to your dealers, did you?

A Nothing came to my attention. There were some minor sales outlined, certainly, in the '69 audit and some very minor sales to some Ford,Lincoln-Mercury dealers.

Q These phases of the '69-'70 audit you do recall?

THE COURT: He said it was never an issue. Now, we don't have to labor it.

Q Sir, in Exhibit U, this phase 4, pre-approving the wholesale customers and identifying those customers by a code number, would that be a method where these wholesalers who had a code number you would then have some control over the parts sold to those wholesalers?

A Your question interchanges two terms. Number 4 refers to wholesale customers.

Q Yes.

A They are retailers. Wholesale customers are retailers. Then at the end of your question you refer to wholesalers.

Wholesale customers are retailers. Wholesalers are wholesalers. There is a little problem of semantics there. That number 4 refers to wholesalers.

Q If you pre-approve wholesalers, and afford them a code number, then you are able to identify the products which they buy and their distribution of those products, aren't you?

MR. MAC CRATE: Objection, your Honor. If the interrogation is with respect to that document, it is relating to wholesale customers and those are retailers.

This question is directed to wholesalers, an entirely different level of distribution.

THE COURT: He doesn't have to limit his questions to that document.

A All right, so if we had a code number for a wholesaler --

Q Yes, you would identify.

A We could identify the parts we sold to him. And that would, as far as I know that would be the end of it.

THE COURT: You would still simply have a code

number about the wholesaler, that would not necessarily identify the customers to whom he resold the parts.

THE WITNESS: That's correct, your Honor. We would know what we sold him and then that would be all we need.

THE COURT: And in order to audit or check or whatever you wanted to do on who that wholesaler was selling to, you would have to go a step farther. Okay.

Q You would have to do this, wouldn't you, if you knew what you were selling that wholesaler, and you know what you're selling your dealers, if wholesaler incentive claims come in which are greater than what you are selling these parties, this will show up in your records, would it not?

A We can tell when a dealer claims on parts that exceed those he purchased from us.

Q By the way, an occasional interchange of a part between dealers, this is something that you expect, is that not so?

A The word "interchange", we don't expect "interchange." We expected "sales from" from one to the other.

Q One dealer to the other?

A Yes.

Q To cover emergency situations?

A Yes.

Q Were you ever at any time refused an audit of the FLM books?

A I don't know.

Q Well, did you ever come across a record, a memorandum, or did anyone from your company ever advise you that we asked for an audit of FLM's books and we were refused it?

A No.

Q After cutting off the allowance to dealers who sell FLM in July of 1971, were you able as a result of that to discharge any employees of the Ford Company in the distribution chain?

THE COURT: I dn't understand that all.

A I don't understand.

THE COURT: You mean, was he able to? Do you mean was he desirous of doing it?

Q Did you, as a result of the cutting off of the allowance to dealers dealing with FLM discharge any employees of Ford in the distribution chain?

A You mean as a result of that action?

Q Yes.

A No.

Q And when FLM was enjoying that allowance from

dealers with which it was dealing, did you have more employees devoted to the dealers who were selling to FLM prior to July 1, of 1970?

A Our head count goes up and down, Mr. Julien, You mean precisely related to whether or not FLM did wholesale incentive.

Q Your head count did not go down as a result of the elimination of FLM as a customer?

A No, it did not.

Q Now, at the end of October of 1972, you were taking action to see that every one of your dealers in the area of FLM's shop was told there would be no more incentive on sales made to FLM, is that right?

A I don't recall taking actions in October of 72 or -- was it '70 or '72 you are speaking of?

Q What? You don't recall it?

A The question --I'd like the question again.

Q In October of '72, you were taking action to see that all dealers were told that if they dealt with FLM they would not get a wholesale discount for those sales; right?

A Now I understand your question. I was not personally taking actions.

Q You were part of it, weren't you?

A I do not recall directing any specific actions to be taken of the nature you are speaking of.

Q Does Mr. Rose, your district manager, does he operate under you?

A Mr. Rose operates under me.

Q Weren't you aware that he was taking these actions, notifying dealers that if they sold to FLM they could expect no further inventory allowance -- wholesale allowances?

THE COURT: On any sales?

MR. JULIEN: To FLM, yes.

THE COURT: All right, FLM. That's a big difference.

A I understand he did this as just a matter of regular business, but I did not direct him to do those things, is my opinion, Mr. Julien.

Q You were notified about it, you did not tell him to correct the procedures where he was stopping wholesale allowances on FLM.

A I don't recall being notified about it.

THE COURT: Mr. Julien, if it was Ford's policy to deny the incentive allowance to certain sales they would inform people of their policy.

MR. JULIEN: Your Honor, this was not a matter

of policy. This was a matter directed at FLM as the exhibits disclose.

THE COURT: Whatever you want to define it, but what's the issue about informing people? If they made a decision, I assume they informed people.

Where do we get from this?

MR. JULIEN: I am coming to that.

THE COURT: Okay.

Q Weren't you informed that at the time your representative was communicating with Atlas to cut off wholesale allowances to FLM, weren't you informed that Atlas claimed that FLM was a valuable account? This is in October of 1972.

MR. MAC CRATE: Objection to the form of the question.

THE COURT: What's the objection?

MR. MAC CRATE: Would you read the question, please.

(Question read)

MR. MAC CRATE: This is to cut off wholesale allowance to FLM.

THE COURT: I get it.

A On that point, we never told them what to do with their wholesale incentives. We were talking to

them. We would not allow wholesale incentives to FLM.

THE COURT: The point of the question is, were you informed that Atlas took the position that FLM was a valuable account. That's the only point of the question.

A Yes, they were a valuable account.

Q And you did more than just inform them; you notified or your representative notified the company, Ford, to withhold allowances for wholesale sales to FLM which even predated October of 1972.

A Wholesale incentives were held up to Atlas. I don't know who made that decision.

THE COURT: That's in the record. It's in the correspondence. Why do we go over this?

MR. JULIEN: There are two purposes, your Honor. First I want to indicate once again to the Court how specific the conduct of the defendants was with respect to the one concern that was doing this business.

THE COURT: Why do you have to tell me things five times? I asked him, you asked him, was there anybody else performing this kind of thing besides FLM? The answer was no.

Now, no matter how you want it, they decided not to give an incentive allowance for sales to FLM, I

assume at some point and they were rather delayed in doing it. They carried out their policy, they cut it off, they told people. For me to hear testimny that they did those things, doesn't eaally add anything to what I know already in spades.

MR. JULIEN: With the greatest respect, your Honor, there are additional things indicated here.

THE COURT: If you want to ask about the additional things that's something else again, but to keep repeating that they carried out their policy, well, of course they carried it out. They were just a little late.

Q As a matter of fact, at the time these discussions were going on between your representative and Atlas, Atlas said it wanted to continue this arrangement with FLM, isn't that so?

A I don't know that.

Q Well, look at --

THE COURT: Is that an exhibit in evidence.

MR. JULIEN: Yes, your Honor.

THE COURT: Well, can't I read it?

MR. JULIEN: Well, your Honor, it's his knowledge that's important. What is done with respect to all of this, and the conduct of the company, doesn't

depend upon the fact that I can show you that somebody thought about it; it's his knowledge that counts under those circumstances so as toindicate how clearly motivated this was towards FLM.

THE COURT: But you are not bringing that out. I mean, I assume that Atlas wanted the business, they were making 3 percent without doing very much on a big volumne. Of course they wanted the business. And I recall they protested to Ford, it's in the documents. Ford knew Atlas wanted the business, and how much more on that point I need to know, I can't conceive of.

Now, if you want to try to prove that Ford if you want to try to prove other things, go ahead, but not this same obvious material.

MR. JULIEN: Your Honor, I am addressing myself now to the point which Mr. MacCrate attempted to establish that there was something wrong with my client's credit relationships with Atlas which impelled Atlas to cut off its dealings with my client.

THE COURT: The record shows now quite clearly that the only reason FLM ever held up a penny was because they weren't getting the credit for the wholesale allowance because of a dispute in '72. That's perfectly clear from the records.

MR. MAC CRATE: Your Honor, so that my silence does not indicate anything to you, I must say that it is our position that there is nothing in the record at this time that establishes that Atlas in fact wanted to continue to sell to FLM, and therefore, if I am correct as to that state of the record, I don't want to be asking that Mr. Julien be foreclosed from such inquiry.

THE COURT: Well, maybe -- all right.

MR. JULIEN: You see, I was aware that he was making this contention, your Honor. He makes the contention in the moving papers before you too, and it is to that to which I am addressing myself now.

Q Your company, in addition to telling Mr. Pollack of Atlas that you would no longer pay these incentives, were also encouraging them to make a claim against FLM to get the incentives back, weren't you?

A My recall on that is strictly in preparation for the trial. At the time that this was going on, and I am hazy as to specifics, I just recall something in some document that I read in preparing for this trial.

THECOURT: That's the document you have? I thinkwe are wasting a lot of time.

MR. JULIEN: 32.

THE COURT: May I have it?

MR. JULIEN: Yes.

(Handing)

THE COURT: Could you assume that I will consider the contents of this document and that the witness does not have to repeat the contents of the documents, and that the knowledge of Mr. Rose, district sales manager of Ford, is the knowledge of Ford?

MR. JULIEN: Very well.

THE COURT: Okay.

MR. JULIEN: I do have a lawyer's curiosity as to why it should be denied by this witness, and I think credibility of every witness is a matter that your Honor should be interested in.

THE COURT: Could you go on to something else?

MR. JULIEN: Yes.

Q By the way, this Mr. Rose, he has been in court here on previous occasions, has he not?

A Yes, he has.

Q Is he in court now?

A No, he is not.

THE COURT: What's the document I just handed you back, just for the record?

MR. JULIEN: 32, your Honor.

Q Is he located in the New York area?

A Yes, he is.

Q You told his Honor when we met last that according to your knowledge, crash parts have gone down in sales from Ford to its dealers.

Do you remember saying that?

A Yes, our crash parts. I think the figure I gave, is the first six months of this year versus the first six months of last year, down seven percent.

Q Well aren't these records which are kept in writing which we can look at?

A I am sure that there is a piece of paper that would have those facts.

Q What is that piece of paper called?

A It would not have any particular name. Every once in a while I will ask for a summary on some subject and I asked for this.

Q Do you have that?

A I don't have it here with me. no, sir.

Q It's back inMichigan?

A Yes, I am sure that there would be a copy of it in or around my office.

Q Well, as a result of the gas shortage there had been a reduction in crashes during the period that

you have given us, isn't that so?

A That's correct.

Q And that you recognize to be a temporary situation?

A Well, I guess you could never hope a drop in crashes would be temporary, but we feel that it is --

Q A shortage of gas would be temporary.

MR. MAC CRATE: Let the witness finish.

A I think we said before it is a factor of speed and miles driven and to the extent that that would change, the other could change.

Q Now, at the time you made this change of policy in July of 1971, did you have any studies made with respect to sales or dealings between your franchise dealers, each with the other?

A 1971? I recall no specific studies.

Q And as to how many transactions were taking place between one dealer and another, you had no specific knowledge at that time?

A The only knowledge we would have would be wholesale incentive claims between one Ford dealer and another on emergency parts where the dealers are more than one hundred miles from the depot. We would have direct information in that specific circumstance but not

others.

Q So, you had no complaints nor records showing that there was a regular transaction of business between any of your franchise dealers with other franchise dealers, is that right?

A You are talking about what period now?

Q Before the change of policy.

A The thing that we looked at was our expenses going up, which told us that we could very well be having some problems.

Q You don't mean your expenses going up. What you are saying is that you were paying out a larger wholesale incentive than you had anticipated, is that correct?

A Let me put it in my words. Our wholesale incentive costs were rising to the point where we were concerned.

Q But you had nothing to indicate that any rise in the wholesale incentive had been caused by transactions between dealers.

A We didn't know what was causing them.

MR. JULIEN: That's all.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Rowlands, with respect to the operations of the wholesale incentive, have you assembled various figures at my request?

A Yes, I have.

Q During 1971, what was the total number of parts of all kinds on which wholesale incentive was allowed?

A Approximately 32,000 part numbers.

Q During 1971, what was the total number of crash parts on which wholesale incentive was allowed?

A Approximately 4,800.

Q During 1971, what was the total number of Motorcraft-Autolite brand parts on which wholesale incentive was allowed?

MR. JULIEN: Objected to as wholly immaterial.

THE COURT: Overruled.

A Approximately 6,900 part numbers.

Q During 1971, what was the total number of Ford brand competitive parts on which wholesale incentive was allowed?

A Approximately 20,000.

MR. JULIEN: Nothing to do with this case. I object to it.

THE COURT: Overruled.

What do you mean, "Ford brand"? Do you mean Autolite, or what?

BY MR. MAC CRATE:

Q Would you explain to his Honor what Ford branded parts are?

A Ford branded parts are those which we sell to Ford and Lincoln Mercury dealers only. Autolite and Motorcraft branded parts we sell to both independent distributors and to Ford and Lincoln Mercury dealers.

Q Now, during 1971, what was the total number of

Ford brand parts on which wholesale incentive was allowed?

A Ford brand competitive, approximately 20,000 part numbers.

THE COURT: What about Autolite?

THE WITNESS: Autolite-Motorcraft were combined, your Honor, into one now of 6,900.

Q During 1971, what was the total number of crash parts sold by Ford Marketing Corporation?

A Total crash parts, irrespective of the wholesale incentive?

Q Irrespective.

A Approximately 10,100.

Q Have you at my request also gathered information as to numbers of jobber wholesalers?

A Yes, I have.

Q How many jobber wholesalers of automotive parts are there estimated to be in the United States?

A 37,000.

THE COURT: How many?

THE WITNESS: 37,000.

Q How many of these are in the area served by the Teterboro Parts Center?

A Approximately ten and a half thousand.

Q Now, as to the ten and a half thousand, can

you break that number down into the different types of areas served by the depot?

MR. JULIEN: I submit, your Honor, that none of this has any bearing on our case.

THE COURT: Objection overruled.

A The facing depot -- the geography in which they are the facing depot would be in the range of three, three and a half thousand. And then, in the area referred to as that where they are the master depot would be approximately 7,000.

THE COURT: I don't understand those terms.

THE WITNESS: Teterboro is what we refer to as a master depot. They carry both A and B parts. They are by class. A are fast moving. B are slower moving. And Teterboro has one geographic area on which they supply A parts and then other dealers supplied by smaller depots come in here to get their B parts, slower moving parts.

Maybe this would help. We have eight master depots in the United States and we have, I guess it would be, twelve facing depots, The eight masters could have B parts and cover the whole US.

THE COURT: And B parts are the slow moving parts?

THE WITNESS: Slow moving. So you could think of it as --

THE COURT: Now, Teterboro furnishes A parts directly to --

THE WITNESS: To a --

THE COURT: -- customer --

A -- to Ford and Lincoln Mercury dealers in a smaller geographic area.

THE COURT: And they furnish B parts to --

THE WITNESS: To a much larger geographic area.

THE COURT: Sub-depots, right?

THE WITNESS: No. Right directly to our customer.

THE COURT: Well, if this is relevant, I'm not getting the picture. What is the point of all this?

MR. MAC CRATE: Your Honor, I will, through another witness, develop the significance of these figures in the operations of the Teterboro center.

THE COURT: What is the significance?

MR. MAC CRATE: The significance goes to any requirement for the direct selling of jobber wholesalers would entail dealing with hundreds upon hundreds of additional customers, and it is all by way of explanation of the reasonable character of the

distribution system that is followed by Ford.

THE COURT: You had better explain what your system is from Teterboro. I certainly don't have any picture of it. If you want to describe that --

MR. MAC CRATE: I am going to do that, your Honor, through a witness who works in Teterboro.

THE COURT: Then let's drop that.

MR. JULIEN: I would like to be heard with respect to this.

THE COURT: I am going to hear the evidence.

MR. JULIEN: Then may I make my point for the record, with your Honor's permission?

THE COURT: Yes.

MR. JULIEN: My point is, first, that the reasonableness of their method of distribution has nothing to do, is not a proper defense in this case. And, secondly, what expenses they would have to do in order to stop stifling competition also has nothing to do with this case.

THE COURT: I think under the Section 2 claim -- I just overruled that objection. I overruled that objection.

Okay. Go ahead, Mr. MacCrate.

MR. MAC CRATE: Did I have an answer to the

last question?

THE COURT: Well, what was it? We had a lot of colloquy.

MR. MAC CRATE: With respect to the division between the facing area and the broader area, was there an answer on the record?

THE COURT: I haven't the faintest idea. But why don't you just ask the question?

BY MR. MAC CRATE:

Q Mr. Rowlands, can you give us the approximate division between the two areas, identifying what they are?

A Yes. Approximately 3,300 are in the facing depot area and approximately seventy two or three hundred in the master depot area.

THE COURT: And you are going to have another witness give the significance of those terms. Okay.

Q Mr. Rowlands, were you at any time informed of a discussion with the Federal Trade Commission relating to whether or not wholesale incentive would be granted with respect to any particular make of automobile?

MR. JULIEN: I object to that.

THE COURT: Overruled.

MR. JULIEN: On the ground of hearsay.

A I recall, when Mustang II was introduced, the question came up as to whether or not crash parts on it would bear wholesale incentive, and our decision not to --

MR. JULIEN: Your Honor, I haven't any idea whose decision he is talking about, who he gets the information from --

THE COURT: Why don't you let him finish his answer.

A [continuing] And I recall that there were -- I did not have the discussions direct, but I recall that there were discussions with Legal as to how it would be viewed by the FTC if we did not put wholesale incentive on the Mustang II.

MR. JULIEN: I move to strike that answer.

THE COURT: I'm just taking it as not to prove the fact of the FTC views and so forth, just for the conversations and considerations of this witness. So the objection is overruled to that extent.

All right. Go ahead, Mr. Mac Crate.

MR. MAC CRATE: I would like to offer in evidence at this time Defendant's Exhibits CS, CT, CU and CV for identification, being four letters exchanged between the Associate General Counsel of Ford and the

Federal Trade Commission in July and August of 1968.

THE COURT: All right. Received.

[Defendant's Exhibits CS, CT, CU and CV for identification were received in evidence.]

MR. JULIEN: May I inquire of counsel whether these exhibits constitute the entire communications by mail or otherwise between the FTC and the Ford Company on this subject?

THE COURT: What about that?

MR. MAC CRATE: There were additional communications, all of which we have produced pursuant to subpoena, and these we feel are the ones that have the essential information.

MR. JULIEN: May I see the others?

THE COURT: Over lunch you work with Mr. Julien so you can have a meeting of the minds on what you produced, so that he knows he has the complete group at his disposal.

But these are received subject to any that Mr. Julien may wish to introduce. All right.

MR. MAC CRATE: I have no further questions, Mr. Rowlands.

BY THE COURT:

Q Just briefly, Mr. Rowlands. Maybe it is somewhere

else in the record already, and I certainly don't like to repeat, but I am not sure it is.

You told me that one of the problems that you had in mind at the time the July '71 policy change was made was this problem of the dealers who sold to FLM not actually performing a wholesale function, right?

A Yes, sir.

Q And you said that in that regard Ford had an interest in encouraging the dealers in giving them incentive to do the wholesale function because it had certain elements of healthy dealership, in your view.

A Yes, your Honor.

Q Okay. Now, what I would like to know is this: Would you search your memory and tell me, either now or after lunch, if you recall any discussions within the Ford organization or between Ford and its dealers during the period shortly before July 1, 1971 in which you were specifically addressing yourself to the question of the desirability or undesirability of having FLM perform the wholesale function which you preferred to have the dealers perform? Do you understand my question?

A Yes, I do.

Q Now, do you recall any such discussions on that subject at all?

A I have no specific recall on FLM being the focal point of our decision. Our focal point was always intermediaries.

My recall on FLM being in my mind is that if it was, it was way back. Our focus was on the intermediaries.

Q What do you mean when you say the focus was on intermediaries?

A That's where -- that was where we were looking at this as the potential problem to us in being unable to control wholesalers --

Q I don't want to artificially break the thing down, but I'm not so much interested right now in the control problem as this problem which you described to me at some length about performance of the wholesale function, problem number two. Do you remember?

A Yes. All right .

Q Okay. Now, I want to know what the discussions were within Ford, if any, about problem number two.

A I can tell you my recall on that is we had discussions on the fact that the language --

Q Who participated in these discussions?

A Typically this would be in a discussion where the activity heads would be together, where we were

looking at, you know, the whole broad concept of how we conduct ourselves on the wholesale incentive program, claiming procedure, et cetera.

My recall is that the language of our policy did not carry out our intent of whole incentive. In other words, we had language -- we have really always intended that our language make it so that you only pay a wholesale incentive when the function is performed. All of our thrust was we have language that is not consistent with our intent. Our intent --

Q Was it anything specific that brought that problem to your mind? Was it FLM or was it other intermediary situations in other parts, or wasn't it anything specific? What was it?

A In 1969, FLM was one of the things that brought it definitely to our minds.

Q Was there any other situation in any other kinds of parts that brought that problem to your minds?

A The way our costs were going up, we suspected that there were other intermediary situations that we didn't know about. We just had a feeling that there was a lot of this going on, but we didn't know where it was.

Q The intermediary problem relates to problem

number one, doesn't it, the control problem?

A Yes. It relates to number one and two.

Q What I want you to -- I've got to adjourn a little early, but I wish over lunch you would search your memory, and if you want to look over the documents you can, if they are any help to you, but I would like to focus, unless it is just too artificial to focus that way, on problem number two again, the performance of the wholesale function, and I would like to have you tell me if you recall any conversations within Ford or with anybody about that problem as it bore on the change of policy you ultimately made on July 1.

I don't know what form it took and maybe there wasn't any discussion, but was there somebody sitting around and saying, "Well, here FLM is out there. They are performing the function of expert advice. We would rather have it done by our Ford dealers "?

Was there anything of that kind or anything else that went on in the discussions within Ford? Just you tell me -- you set your memory after lunch --

A Right.

Q During the lunch recess.

A Right.

THE COURT: We'll resume at 2:15.

MR. JULIEN: May I, before you recess --

THE COURT: I have got to go. I am a little bit late. We'll resume at 2:15.

MR. JULIEN: I want to respectfully say, your Honor, that this kind of an interrogatory and then a lunch period in between doesn't serve the function unless he is instructed not to discuss this case with anybody.

THE COURT: No. I really won't accept that.

[Luncheon recess.]

AFTERNOON SESSION

2:15 P.M.

(Trial resumed)

MORRIS J. ROWLANDS, resumed.

THE COURT: There is, gentlemen, a ruling on the Rose deposition, Plaintiff's Exhibit 110 for identification.

Now, as I understand the portion marked by the defendants is page 141 through --

MR. MAC CRATE: 147, your Honor.

THE COURT -- through 147.

Do you object to all of that?

MR. JULIEN: Yes, your Honor.

THE COURT: I will sustain the objection.

So, 110 will be received just to the extent of the portions marked by the plaintiff on page 74, page 99, page 100, page 115, page 116.

There wasn't any problem on the Rowlands deposition, was there?

MR. JULIEN: No problem raised there.

We agreed on that.

THE COURT: All right.

Okay, did you have anything further?

REDIRECT EXAMINATION

BY MR. MAC CRATE:

Q During the luncheon recess, Mr. Rowlands, what have you done to refresh your recollection as to any discussions leading up to the change of policy in July of 1971?

A Well, I have in this envelope the material that was given me to prepare for a deposition; in addition, one other document that was just given to me this afternoon, and they relate to the period of early 1970 through mid 1971, and I read them with the hope of refreshing my meory, and that's what I did during the lunch hour.

THE COURT: What is your memory?

THE WITNESS: I do not recall FLM being discussed in any of our meetings on the subject of wholesale incentive policy changes.

BY THE COURT:

Q Well, that really wasn't my question.

You tell me what were the discussions. Just start. Just tell me from beginning to end all the dis-

cussions you remember that you would classify as leading up in any way to the July 1, 1971 change of policy.

A Your Honor, I will do my best. They start back in 1970.

Q All right, start in 1970.

A My recollection is that the first thing we came to grips with was the subject of an eligible part where we said in our old policy that one Ford dealer could buy it from another Ford dealer who bought it from Ford Motor Company and that would be an eligible part.

Q And that would be the violation of your intent, right?

A No, that would be all right on our intent, but we discussed the fact that it did not seem to be something we could administer because dealer A who bought it from dealer B did not have a way of determining whether dealer B bought it direct from us.

Q I don't understand the problem.

A Maybe I have gone back too far.

Q No, what was the -- who were you talking with back in 1970?

A Well, our meetings involved activity heads, that would be principally the people we talked with.

occasionally I would talk with members of my staff. I would talk with legal counsel.

BY MR. MAC CRATE:

Q Would you identify activity heads?

A Activity heads would be division controller, marketing manager, supply and distribution manager, and myself.

BY THE COURT:

Q All right, what was the discussion about? You started telling me.

A The discussion had to do with tightening up our policy on eligible parts.

Q Tightening up against what?

A The way it read was that an eligible part could be one that dealer A purchased from dealer B provided dealer B had purchased it direct from Ford Motor Company.

Q What was that that you wanted to tighten against?

A We changed it to read where dealer A had to buy it direct from Ford Motor Company. We eliminated as an eligible part one he purchased from another Ford dealer.

Q Why did you do that?

A Because there were audits where it was learned that dealer A bought the part from dealer B, claimed

wholesale incentive on it, but dealer B had not bought the part direct from Ford Motor Company.

Q Okay.

A And dealer A took the position, how did I know that? Your policy put me in an untenable position.

Q You deny the wholesale incentive to a Ford dealer selling to a Ford dealer?

A This was an eligible part where if a Ford dealer -- if dealer A purchased a part from dealer B, claimed wholesale incentive on it but it turned out that dealer B did not buy the part direct from Ford then that became an ineligible part so we eliminated as an eligible part one that a Ford dealer did not buy direct from us. That was our first change.

Q Okay, and there was discussion about that?

A Yes.

Q And why did you make that change?

A We made that change because it placed dealer A in a untenable position where he really would not know whether dealer B had bought it direct from us or not so we decided we would eliminate the problem and just make it where he would buy direct from us. That he would certainly know of.

There were other considerations having to do

with those other five points in that communication, and the first meetings I can recall were we were getting right down to grips with another change --

Q The memorandum reading Defendants' Exhibit U, the one we looked at this morning.

A I believe that was U, your Honor, the one that has six points outlined and we talked about point 4 this morning.

Q Right.

A And that in early or mid -- oh, it would have been somewhere the first, second quarter of 1971, my recollection is along about the April-May period, we then -- then we got serious about the change having to do with the sale to intermediaries.

Q What do you mean precisely by "sale to intermediaries"?

A It's where our policy read that an eligible wholesale customer was one who purchased it for resale, and that term "resale" can apply to both a wholesaler and a retailer, and it was in that policy, your Honor, where it said, an eligible sale was -- let me rephrase that.

It was in that policy where we said that an ineligible sale was to a broker or to an intermediary

who sold to an ineligible customer. It sort of was in the spring of '71 it came to grips with that particular policy.

Now, in that meeting, I can --

Q Do you recall a particular meeting?

A There were many -- there would be papers circulated, we would have discussions occasionally when we had a policy to where it was fairly well formulated, at that point it would not be unusual for the activity heads to get together on it. I cannot give you specific dates. I just don't recall specific dates.

Q I am not asking you for specific dates.

A All right. I do recall during that period talking with legal counsel on the subject of paying wholesale incentive to customers who did not in fact perform the wholesale function.

Q Who did you talk to?

A It was Bruce Kulp and possibly Bob Scott. I know Bruce Kulp and probably Bob Scott, where we discussed on a number of occasions the problem of paying wholesale incentive when the function was not performed and the problems this could cause us in our dual distribution system.

Q All right, you gave me two names, Bruce Kulp.

A K-u-l-p.

Q And Bob Scott.

A S-c-o-t-t.

Q And you discussed -- and they were both lawyers working for Ford?

A Correct.

Q And you discussed the matters of paying wholesale incentive discounts to parties not performing?

A The function. With specific -- I remember specific reference with Bruce Kulp having to do with this as it related to our dual distribution system, dealer channel, and independent channel.

Q Now, that's that --

A That's that number 3 issue we talked about.

Q Or number 2.

A It also is part of number 2.

Q 2 and 3 are --

A They are really very much interrelated.

Q Tell me exactly what you said to Bruce Culp and Bob Scott and what they said to you.

MR. JULIEN: I have to object to that, Judge.

THE COURT: What is the objection?

MR. JULIEN: Communications between persons employed by the defendant certainly do not reach the level of competent evidence. What he says to his lawyer and what his lawyer says to him doesn't reach the level of evidence binding upon my client.

THE COURT: Well, we have another objection from Mr. Mac Crate.

MR. MAC CRATE: Yes, your Honor. I am concerned about the attorney-client privilege at this point.

THE COURT: It is up to you to object. Do you object or don't you?

MR. MAC CRATE: I feel that as to a general interrogation in this area about all communications between attorney and client I must maintain an objection.

THE COURT: Then you object.

MR. MAC CRATE: I do.

THE COURT: The thing is, I would think that Ford's purpose in making the changes probably are of some considerable importance, and I don't know whether it is conclusive, you know there are lots of things

in the law that are determined without regard to purpose, but certainly purpose I would think would be something that here would be of some importance.

MR. MAC CRATE: As to the particular inquiry --

.2pm THE COURT: Just a minute. I interrogated the witness about Ford's purpose and he mentioned to me the three problems. But I did not have from any of the examination of this witness really up to now any concrete evidence of discussions or communications backing up what the witness has told me about the purpose.

The record is silent as of now as to evidence, actual discussions or meetings or memos about the discussions leading up to this policy change and what they consisted of and how much they did or did not relate to FLM or how much they did or did not relate to crash parts versus other kinds of parts. All of that is really a big blank.

I mean, if it is the intention of the lawyers to leave it as a blank, maybe that's what you want to do.

MR. MAC CRATE: If I may state my position, your Honor, I have no objection to narrowing the interrogation on this point. But what I want to protect is the general relation of attorney and client, and I don't want to be confronted with the argument that I have

waived the attorney-client privilege between Ford business personnel and their attorneys by allowing interrogation on this limited subject that your Honor was directing his questions to.

THE COURT: I don't want to press you really, and I didn't mean to. I don't want to press you to waive the attorney-client privilege even on a limited subject. You are entitled to take the privilege.

My feeling is that if the witness is willing to testify about the conversations on this subject, I wouldn't see that that would necessarily waive the general right to insist on privilege or the right to insist on privilege on other subjects. So, if you can be guided in any way by that, that's fine.

MR. MAC CRATE: I will withdraw my objection to the particular question.

THE COURT: Okay.

MR. JULIEN: I would like to make my position clear.

THE COURT: Right.

MR. JULIEN: First, I have contended throughout that their reasons for doing what I consider to be violations of law are by no means pertinent to our case. But, passing that for the moment, because of the position

we are in at the moment, your Honor's question addressed to what a lawyer says to him and what he said to the lawyer certainly does not reach the level of exemplifying what their intent is excepting to depend upon conversations which are not binding on the other side.

They are hearsay, they are not binding upon us, and they do not exemplify intent. What you say to a lawyer and what he says to you I think is far apart from what intent would be if it were admissible here.

THE COURT: If I recall correctly, when you were interrogating Mr. Rowlands at the very beginning of the trial, you asked if there were any discussions leading up to the policy change relating to protecting Ford dealers from FLM in response to dealers' complaints, that kind of thing. The answer was no. So you asked about potential discussions, as you had every right to do because Ford is an opposing party.

Of course, if Mr. MacCrate got up and asked about discussions, I suppose he could be met with hearsay objections. I am in the middle, I am the Court, and so I am not clear whether I am really able to ask for the kind of testimony which you would be able to ask about, you being the opponent.

But I am really wondering if it is a hearsay

thing.

MR. JULIEN: Let me say --

THE COURT: I'm not asking him questions about conversations in order to find out the truth or falsity of the facts stated in those conversations. I am asking about conversations as they may bear upon Ford's intention and purpose. What is stated in those conversations would be either direct or circumstantial evidence of Ford's purpose.

Now, is that really a hearsay problem?

3pm MR. JULIEN: Indeed, it is not only hearsay but it is incompetent.

THE COURT: Well now, wait a minute.

MR. JULIEN: Let me say why.

THE COURT: What is the hearsay? Let's just not rush with the hearsay. What is the hearsay?

MR. JULIEN: First, this gentleman is reporting conversations not with anyone who is in an adversarial position or delegated or an agent of him. He is reporting an alleged conversation with another employee, who in this case happens to be a lawyer of Ford. That makes it hearsay.

Secondly, as to its binding effect and its appropriateness --

THE COURT: You say it makes it hearsay. You haven't explained why. I thought the hearsay rule was where a witness testifies Joe Jones told me that he was walking across the corner of 57th and Broadway at five a.m. in the morning and it was raining. If you introduce that testimony, that out of court statement of Joe Jones to prove all those facts, of course it is hearsay.

But there are lots of other uses of conversations which are not hearsay, and I'm no expert but I am wondering if this at least isn't the kind of thing that I just posed. Is it?

MR. JULIEN: It might be close to it. Let me say why.

Let us assume that he says, "I talked to Mr. Scott and Mr. Scott said it is perfectly proper to do thus and so." That is hearsay. Mr. Scott has to come in.

THE COURT: I won't be taking it to prove that it was or was not proper or that the FTC did or did not make a demand. I would be simply taking the fact of the conversation as having some probative value as to what Ford's purpose was, just the mere fact of the conversation. So I think I will overrule the hearsay

objection and I will let the witness testify.

BY THE COURT:

Q Okay. What was your conversation with Mr. -- Did you talk to Mr. Culp alone or did you talk to him with Mr. Scott? Was it a two-way meeting, a three-way meeting, or what? Or was it just a series of talks?

A It was more than one occasion. On the telephone I recall, once in the office, most of the conversation was where he was more or less saying that he would like this policy change made.

Q Who is "he"? Which one?

A Mr. Culp.

Q Just tell me. You recall a specific phone conversation?

A I recall conversations, your Honor. I am going back four years.

Q All right. Tell me the best you can remember, and as specifically as possible, who said what in substance.

A In substance, Mr. Culp said paying a wholesale incentive to dealers who do not perform the function and having language that permits a dealer to sell a Motorcraft branded part to a wholesaler places the company in a very poor position with regard to our

functional discount structure as it relates to our independent channel.

My position at the time was, being in sales my concern always is, I want policies, you know, to protect the company --

Q Just don't tell me what you want. I mean --

A All right. My conversation, then, was to the effect that I don't want to eliminate any customers unless we have to, because I want to maximize our wholesale incentive effort.

At that time there were some kinds of retailers who do not have a shop, they do not do repair work. They are the type of retailer who would just sell over the counter to consumers but would not have a repair shop. So I recall having a problem that they were going to tighten the policy up to where I can do some business --

MR. JULIEN: I am not clear as to whether this is conversation or whether this is --

THE WITNESS: I am trying to give the best I recall--

Q You are trying to give the discussion.

A Yes. I am trying to give you the way -- I think I've given you the way he was talking. What I'm trying to give you now is, I was taking a position

of let's not get our language so tight that I eliminate certain retailers as being eligible customers.

Q What kind of retailers were you worried about?

A It would be a retailer who does not have a garage, who does not do actual repair work. The policy --

Q The kind of retailer who just sold parts.

A Yes.

Q To an individual coming in who wanted to repair his own fender, say?

A Yes. Or, again, in the total context of our policy, any of our parts where a consumer would come in--

Q We are just talking about fenders.

A All right. A crash part. In other words --

Q There were people who acted as retailers who simply sold parts to the individual coming in, is that right?

A There were retailers who did not have shop facilities associated with their store.

Q All right.

A And I did not -- I was concerned that our language would eliminate them as eligible wholesale customers and thereby restrict my sales.

Q All right.

A That --

Q So what did Mr. Kulp say to that?

A It got down to where basically we couldn't quantify that risk. We just did not have information to quantify what sales risk was involved, and the discussions led to where I pretty much agreed that we should go ahead and change the policy.

Q Now, was there any discussion of the reason why it was difficult to the incentive allowance to dealers not performing the function of a wholesaler? Maybe you've already told me that, but --

A It is as you put it. Number two and three become quite inter-related.

Q Yes. But you tell me again, and even if you are repeating it, what was the discussion between you and Mr. Kulp on that point? Was there any discussion as to the reason why it was difficult to do that, to give discounts to people not performing the wholesale function?

A Well, just that it was inconsistent with -- it is just inconsistent with our policy to pay wholesale incentive when they perform the function. It was just inconsistent with why you pay wholesale incentive.

And he felt that, and I guess I felt also, that that was inconsistent.

Q Did Mr. Kulp have some language drafted to change your directives or whatever you call them? Did you go over specific language?

A My recollection, your Honor, is that the language was developed by the Forward Plans Department and then cleared with him.

Q This was before the Forward Plans Department had developed the language, is that right?

A At the time of our discussions, yes.

Q Okay. Mr. Kulp wanted some language to make it clear that an eligible customer was not someone who resold, isn't that basically it?

A Not quite. He wanted the eligible customer to be spelled out in such a way that it was absolute that that eligible customer was in fact a retailer. And that's why the language that had to do with repairing --

Q Which means he couldn't resell it.

A Couldn't resell it to a consumer.

Q Couldn't resell it to a retailer or to a reseller.

A Well, our problem is that the retailer of course is a reseller also.

Q Certainly. All right.

A And what he wanted to do was make sure that that word "resale" applied strictly to that retail business that was reselling to a consumer.

Q In other words, the eligible sale would be a sale by the dealer to a retailer.

A Correct.

Q Okay. Now, was this discussion about crash parts or all the parts across the board?

A All parts across the board, Motorcraft, Autolite, Ford brand competitive, and crash.

Q And these would be rules and regulations governing the sales by jobber wholesalers, right?

A This policy would apply to Ford and Lincoln Mercury dealers.

Q But when it comes to Motorcraft and Autolite parts, you had some jobber wholesalers who weren't dealers, right?

A They are customers of the warehouse distributor.

Q Right.

A They are not our direct customers. They are customers of the warehouse distributor.

Q Right. And so Ford doesn't give any kind of a discount to them at all.

A No.

Q Right.

A Our discounting to the distributor and then what he passes on from there is his business.

Q So you were dealing with the discounts to be given to the dealers acting as jobber wholesalers.

A Yes, sir.

Q And you were dealing with the kinds of parts sold directly by FMC to those dealers, obviously, right?

A To Ford and Lincoln Mercury dealers.

Q But were there any other kinds of parts sold directly by Ford to -- well, of course there were. In other words, there were many parts, including the Ford brand parts, that were sold directly by Ford to the franchise dealers which they wholesaled, right? Not just crash parts.

A No, that's correct. There were many other parts that they would wholesale.

Q And that would include the Ford brand parts?

A That was the 32,000 wholesale incentive.

Q 32,000.

A Yes.

Q And do I understand Mr. Kulp was discussing with you the policy and language to be applied to all

those kinds of parts?

A All 32,000 parts.

Q Not just crash parts.

A That's right, your Honor.

Q Now, let me ask you this: If we go to other kinds of parts besides crash parts, to Ford brand parts, the Autolite-Motorcraft parts and so forth, were there people performing a function like FLM with respect to the Ford brand parts and the Autolite-Motorcraft parts?

A We had in some audits come across intermediaries who were buying parts other than crash parts and moving them back to Ford dealers.

Q But did you know of any instance in those other kinds of parts where there was somebody like FLM who was wholesaling the parts to independent body shops?

A And you are qualifying that, buying from a Ford dealer?

Q Yes, I am.

A And then selling to some other retailer?

Q Yes.

A Not back to a Ford dealer.

Q Right.

A I don't know specifically of any. I'm sure that -- I don't want to deviate from the question, but

one of our concerns was that there were a number of such businesses that we did not have our hands on, didn't know what was going on.

MR. JULIEN: I have to move to strike that answer.

THE COURT: Motion denied.

Q One of your concerns was that there were other businesses besides FLM in other parts --

A Yes.

Q -- who were buying from dealers and then selling to body shops?

A No. Selling to dealers. Selling to dealers.

Q Selling to dealers.

A Our dealers.

Q I have a continuing problem because I'm getting the impression that --

A I'm sorry about that.

Q -- the overwhelming concern here was having these intermediaries act as intermediaries between Ford dealers.

A That was a very definite concern, yes, sir.

Q And that you weren't really giving consideration to people doing what FLM was doing, that is, bona fide selling to body shops as distinct from Ford dealers.

A Our concern was with the intermediary as an intermediary and our inability to really know what he was doing, whether he was making bona fide sales or circulating it back into our dealers. It was the whole subject of once the Ford dealer made a sale to an intermediary then our ability to know what was going to happen after that was such that we just lost control of our program.

Q I know we went over this point, but still the question exists.

When you were concerned about not knowing what was going on, you were concerned for a reason. You wanted to know something; right? That isn't a good way to put it.

If I'm concerned about an uncertainty on any subject, I'm not just doing it for poetic reasons; there is something I want to know, right?

A Yes.

Q Okay.

And Ford, you, wanted to know something here that you felt you didn't have information about, right?

Now, what was it you wanted to know?

A We wanted to be able to walk into a Ford or Lincoln-Mercury dealership and right within that dealership determine was that part an eligible part and did it go to an eligible wholesale customer, and do it right at the Ford dealership where we made the original sale.

And we wanted to eliminate from our policy anything where it would be possible to pay an incentive where he didn't perform the function and then we couldn't determine what happened after that.

Q And the ultimate thing that you were concerned about was whether this part was circulated to another Ford dealer, wasn't it?

A Well, we are back to the number one concern now, your Honor.

Q I can't tell whether there really and truly was a number 2 and a number 3 concern. That's what bothers me.

A I guess I've done a poor job explaining that.

Q We always get back, it seems to me, in the last analysis to the problem of the circulation to other Ford dealers.

A No. There is one point I failed to make clear. I'll try again.

There are about 900 wholesale distributors

that we sell Motorcraft and Autolite parts to, branded parts. We sell to them at a distributor price because they perform the distributor function of selling to a wholesaler. That price is lower than the acquisition price of an identical part branded Motorcraft-Autolite sold to a Ford dealer after the Ford dealer collects wholesale incentive from us.

Now, Mr. Kulp's concern was that the Ford dealer who sells Part A to a wholesaler is exactly the same part as a distributor sells to a wholesaler. He can come and argue, "I performed the distributor function. You only gave me a wholesale acquisition price."

And Mr. Kulp felt that we were in a very poor position on it because --

Q To deny him the distributor price.

A That's correct, because by definition, and that is really the way we live in our industry is by definition, because by definition he did perform the distributor function.

That was a very big concern of Mr. Kulp's and it is the one that he used very forcefully with me.

Q Now I want to return again, and this of course related to all kinds of parts. Your discussion was not isolated to crash parts. You've made that clear.

A That's correct, yes.

Q But was there in any of your discussions with Mr. Kulp or Mr. Scott ever the mention of FLM?

A I don't recall.

Q Was there ever a mention specifically of the New York area? Was there any mention of the New York area?

A Your Honor, this goes back four years,and when I try to recall what I mentioned, it is very difficult for me to give you a straight answer on that.

Q I am asking for your memory.

A My memory -- I don't recall specific discussions of FLM in the northeast in discussing our entire wholesale incentive policies.

Q You've told me about Kulp.

What discussions did you have with Mr. Scott?

A I mentioned Mr. Scott because the two of them served our division and there was a point in time where you might talk to either one of them. So I mentioned Mr. Scott because it was sort of the transition point between one to the other, and I could have had a discussion with him. That's why I mention I do not recall a specific discussion with him. But I do recall specific ones with Kulp. But because of the timing, it is entirely possible that he and I could have had a discussion.

Q Now, were there any discussions leading up to the July 1 change of policy that you can recall on this subject aside from the ones you talked about with Mr. Kulp and Mr. Scott?

A You mean discussions on wholesale incentive?

Q Well, I know it is a kind of broad question and I don't want to get into every aspect of it, but I want to talk about, was there any discussion about problems one, two or three aside from the ones you have mentioned to me?

A Yes. During that period of early '70 and in through '71, what we are talking now, the majority of our discussions at that time were how do we change our wholesale incentive claiming system to tighten it up. Those discussions really took up more of our time than our discussions on the policy changes.

Q In other words, just to make the forms better and so forth.

A It was a rather massive change.

Q The audits?

A It was a total new approach tothe wholesale incentive claiming, to literally --

Q But that was procedural.

A Procedural. But, again, it is hard for me to

separate it from the whole subject because it was part of our whole effort to try to control these costs, and we really spent more time on the wholesale incentive claiming system and how to make changes, to make it more disciplined, than we did on those other things, and I guess that's why I'm having some difficulty with recall, because it was such a big subject; we spent so much time on it.

THE COURT: Okay. I guess I don't have anything else.

Any further questions?

MR. JULIEN: Yes, I have several.

THE COURT: All right. Go ahead.

MR. JULIEN: I have to look at these documents which the witness now says he consulted to refresh his recollection.

THE COURT: What do you want to ask him?

MR. JULIEN: As a predicate to that I must needs look at what he has looked at to be able to --

THE COURT: All right. Help yourself.

MR. JULIEN: All right.

RECROSS EXAMINATION

BY MR. JULIEN:

Q This paper which is outside the envelope you never saw before this luncheon recess?

A I was copied on it. It was not in the material given to me to refresh my memory for this case. It was given to me this noon.

MR. JULIEN: May that be marked for identification so we know which one we are referring to?

(Plaintiff's Exhibit 113 was marked for identification)

Q Are these gentlemen, Mr. Kulp and Mr. Scott, house counsel, in house counsel? For Ford?

A I'm not really sure of the term "in house." They are employed by Ford Motor Company.

Q Employed.

A Yes.

Q With respect to any of these conversations that you now recall, were there any memos made by you or received by you from the lawyers after the discussions were had?

A Not to my recollection.

Q Wasn't that the customary practice, that where you had discussed a legal matter with one of counsel that there would be some memo reaching you on the subject?

A No, that is not customary.

Q Well, mayI ask, is this today the first occasion when you've been asked to recall the conversations

which you had with either Mr. Kulp or the other gentleman whom you mentioned, legal counsel?

THE COURT: I don't understand the question. What difference does it make? Are you trying to impeach him? Have you got a prior instance when you asked him?

MR. JULIEN: No. I'm testing memory, if your Honor please. You have conversations here -- well, I don't want to reveal my purpose prior to asking this kind of question, if your Honor please. I think it is appropriate --

THE COURT: I sustain the objection.

MR. JULIEN: -- where a conversation has been cudgeled up some four years later without a memo, to ask when were you first asked about it.

THE COURT: You could have asked him in the deposition. Did you?

MR. JULIEN: My position is that conversations with lawyers would have no place here. Would I be opening the door by that sort of thing by myself asking that?

THE COURT: Don't ask him if he was asked about it before. Let's not waste time.

MR. JULIEN: You miss my point entirely. Since it has been elicited, I have a right to test its veracity, do I not? And by doing that it is appropriate

to find out when for the first time any interrogator, the Court or counsel, asked hi that question.

THE COURT: Well, there is no objection, but I just can't -- objection sustained. Let's go ahead.

BY MR. JULIEN:

Q At the time you were having these conversations that you told us about with Mr. Kulp, you had already had the 1970 audit with respect to FLM and had made certain recommendations respecting it, had you not?

A 1970. That was in the fall of 1970? The discussions on this entire subject went on from the first quarter of '70 through the summer of '71.

Q Well, --

A And I'm unable to pinpoint just what months I might have had these discussions with Mr. Kulp.

Q Can't you tell us whether it was in 1971 or in '70? Don't you have a note which will refresh you on it?

A No, I don't have a note.

Q At any rate, when you were talking about retailers who may sell parts over the counter, you weren't talking about crash parts then, were you?

A No. Mostly on our mind would be Ford brand and Autolite, Motorcraft.

Q Mr. Rowlands, crash parts are not sold over the counter by retail stores, are they?

A Not as a practice.

Q You told us before the recess that there are some 37,000 wholesalers of parts in this country.

Did I get that correct?

A Yes. 37,000 wholesalers of automotive parts.

Q Is this some study which was made by your concern?

A The source was represented to me as a Dun & Bradstreet --

Q Please.

Was the study made by your concern?

A By our concern? You are speaking of Ford Motor Company?

Q Yes.

A No.

Q And whomsoever the study may have been made by, do you have it here?

A Do I have the study here?

Q That's the question.

THE COURT: What study?

MR. JULIEN: Study with respect to how many wholesalers of auto parts there are in this country.

THE COURT: I don't recall any testimony that there was a study.

Was there a study?

MR. JULIEN: He just said so.

THE WITNESS: No. I said there was not a study. We did not make a study.

Q You made no study.

A That's correct

Q Of your own knowledge you do not know.

A Of my own knowledge we did not make a study.

Q Now, whatever figure there is for wholesalers, were you including your franchise dealers in that total?

A No.

Q Or other franchise dealers of other companies?

A No.

Q And, incidentally, with respect to wholesalers of Ford crash parts, there was only one that you knew of at that time that was independent of the Ford distributive system, isn't that so?

A To my specific knowledge.

Q The answer is yes?

A Yes.

Q Well, at the time that FLM was doing business as an eligible customer for the discount, did that cost

your firm anything additional in the way of overhead and help?

A Not to my knowledge.

Q And continuing right down to 1972, and even subsequent to '72, did FLM's procedures in purchases involve your company in any additional expense?

A After the policy change of '71 I guess the answer would be yes in that we paid wholesale incentive on sales that were not in accordance with our policy.

Q Well, let's put aside what you paid by way of wholesale incentive. I want to know whether you had any overhead costs apart from that engendered by the fact that FLM was purchasing at wholesale from your dealers.

A None that I would be aware of.

Q And when FLM was operating under a code card, did that cause any additional overhead to your concern?

MR. MAC CRATE: Just a moment. May I have that question. I didn't catch the first three or four words.

(Question read)

MR. MAC CRAFTE: Under a code quide?

MR. JULIEN: Code card.

THE COURT: I guess code number. Objection

overruled.

A I guess I wouldn't be a good person to answer that.

Q So far as you know?

A So far as I know, I don't know. It would have to do with depot costs that I'm not familiar at all with.

Q So far as you know, no information has ever reached you to indicate that Ford was undergoing an additional overhead because of the use of the card by FLM; is that correct?

A Nothing like that has ever been discussed with me.

Q And from your experience you can think of no additional cost engendered by the use of the card, is that correct?

THE COURT: He already said no.

MR. JULIEN: All right.

Q In the granting of franchises to your dealers, does your company examine the locations which the franchise dealers intend to run their business at?

A Yes.

THE COURT: I thought you had completed cross and I was certainly going to permit you to ask questions

that were necessary to follow up my questions.

MR.JULIEN: I have some of those too.

TH COURT: I think this is just getting back into some cross that has nothing to do with anything I asked.

MR. JULIEN: Well, your Honor, this does have to do with the figures given by him respecting how many dealers there are --

THE COURT: It isn't anything I asked him. I just asked him about some conversations.

MR. JULIEN: No. That was before the recess, your Honor.

THE COURT: All right. I see. This is about Mr. MacCrate's redirect. Okay.

Q And is it the policy of your company not to permit one franchise dealer's premises to be too close to another?

A We have a policy to cover a geographic area with a set number of dealers, and before one dealership would relocate to another location, yes, the company would have to approve such a move.

Q And so, if there was an independent wholesaler, this might infringe upon some of the territory which a franchise dealer enjoyed?

MR. MAC CRATE: Objection, your Honor.

THE COURT: Sustained. Argumentive. It is obvious that they would be in competition.

Q During the recess, after having listened to the last question the Court put to you prior to the recess, did you confer with anyone at all before resuming the stand?

A Yes.

Q With whom?

A With Mr. MacCrate and Mr. Zolbert.

Q And as to the question of whether or not it should be said that FLM entered into the verbal discussions taking place in '70 and '71, was that a subject discussed by you with either of these gentlemen?

A That was the subject of our discussion.

Q These policy meetings which were had prior to the change of policy in July of 1971, do you have, apart from Exhibit U, any others which either recite or lay out what is being discussed at those meetings?

A Well, the discussion papers -- the folder that I used to refresh my memory this noon, had, certainly, two or three documents that were discussion papers for wholesale incentive meeting purposes.

Q And if you could, briefly, select any which

refer to crash parts.

(Pause)

A Mr. Julien, to the extent that these deal with wholesale incentive, you know, the whole subject of wholesale incentive, they would automatically deal with crash parts. So, I mean, I was starting to separate those that werekind of, you know, special crash parts --

THE COURT: Mr. Julien, what are the references you want to direct his attention to?

MR. JULIEN: Only those which lay out either the agenda for or discussions had at any of these policy meetings which predate the change of policy of July 1, 1970.

THE COURT: You have the documents. What is it specifically you want to ask him about?

MR. JULIEN: My present understanding is that there seems to be no other record of such meetings other than Exhibit U, which is in evidence. If there is anything else, I want the benefit of it.

THE COURT: What is your question?

Q The question is, are there any records showing the agenda or discussions at meetings other than Exhibit U?

A Well, there, Mr. Julien, these are discussion papers. They are not -- they are not to be construed as

an agenda. Associate this with meetings I think is probably misleading. A paper does not mean that absolutely on this date or immediately following there was a meeting.

In our meetings we typically will have a discussion paper, not unlike these formats. My concern in answering your question is I don't want to indicate to the Court that when one of these pieces of paper hits my desk that we immediately have a meeting or another one very shortly thereafter. Sometimes there is a discussion piece like this which there will not be a meeting, it is just to get our thinking going.

Q Was there ever any discussion about the change in policy which would effectuate discounts given to independent wholesalers by your dealers?

A Was there ever --

THE COURT: Oh, Lord. He has given very substantial discussions. I don't understand the question.

MR. JULIEN: I am not talking about intermediaries, if your Honor please.

Q FLM was a unique wholesaler, isn't that so?

A We have indicated I know of no other wholesaler of crash parts.

Q Yes.

Well, when you were talking about a change in

your policy, was there anything said about what would happen to this unique wholesaler?

A No. I've already testified to that effect.

Q But you were aware at that time of that unique--

THE COURT: Mr. Julien, we have had this 15 or 20 or 30 times.

Q That conversation that you had with Mr. Kulp on the subject of the distributor function, that again had nothing to do with crash parts, did it?

A To the extent that it had to do with the same policy controlling crash parts, yes. And that it did.

Q Well, you had no distributors in your line of distribution for crash parts, did you?

A That's correct.

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Q And when you were talking to Mr. Kulp on this general subject, did you tell him that you had no study which indicated that dealers were selling to dealers, or that intermediaries were selling to dealers? Did you tell him that?

A This was the general knowledge, Mr. Kulp, that we were concerned about this.

Q I am asking you whether you told him; did you?

A I don't recall specifically saying, we have dealers selling to -- intermediaries selling to dealers.

Q At the time you were discussing this policy change, didn't it occur to you that you would be eliminating this wholesaler FLM from a competitive position?

A My concern --

Q No, please answer my question.

A That was not on my mind.

Q But didn't you realize that this would effect FLM's competitive position?

A If I had stopped to review everything, possibly yes, Mr. Julien, but I deal with the United States, and my mind was taken up with the whole subjects of intermediaries, not any specific one, two or three or so.

Q Well, on the entire subject of all wholesalers,

if there were any others, didn't you and your associates discuss at all what effect this would have on the independent wholesalers?

A No, we did not.

Q You do appreciate now, don't you, that this places them in a poor competitive position?

MR. MAC CRATE: Objection, your Honor.

THE COURT: Overruled.

Q You do, don't you?

A Yes, it would place them in a poor competitive position.

MR. JULIEN: Yes, sir.

THE COURT: Okay, you may step down.

(Witness excused)

THE COURT: Next witness?

MR. JULIEN: Your Honor, may I call your attention to the fact that I have a pre-existing engagement which requires me to be in Hartford by 6:00 o'clock.

THE COURT: All right, we will recess until 10:00 o'clock tomorrow.

(Adjournment to October 8, 1974 at 10:00 o'clock a.m.)

FLM COLLISION PARTS, INC.,

- against - 73 Civ. 713

FORD MOTOR CO. and FORD MARKETING CORPORATION.

October 8, 1974

10:15 a.m.

[Trial resumed.]

J A M E S R . R O S E, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Rose, by whom are you employed?

A The Ford Motor Company.

Q Are you a direct employee of the Ford Motor Company or the Ford Marketing Corporation?

A The Ford Marketing Corporation.

Q For what period were you the New York District Sales Manager for the Ford Parts Division?

A From May 1st of 1970 until December 1972, December 31st, 1972.

Q Did you at any time tell Mr. Pollack of Atlas Lincoln Mercury that he could not sell crash parts to FLM?

A Absolutely not.

MR. MAC CRATE: I have no further questions.

CROSS-EXAMINATION

BY MR. JULIEN:

Q Mr. Rose, in November of 1972, on the latter part of October 1972, did you have a conversation with Mr. Pollack of Atlas?

A Yes, I did.

Q One or more?

A I believe there was more than one conversation. One physical contact and probably one or more by phone.

Q And those conversations were on the subject of FLM, were they not?

A No, they were on the subject of the dealers reporting for incentives erroneously, which were not in accordance with our policy.

Q I ask you, did you discuss FLM with Mr. Pollack of Atlas?

A Yes. FLM was brought up.

Q With respect to Atlas, wasn't FLM the only customer of Atlas concerning which you were conveying information to Mr. Pollack?

A I wasn't conveying information to Mr. Pollack. As I saw it, he was conveying information to me.

Q Had your purpose in going to see Mr. Pollack

been to inform him that incentive rebates for wholesale would no longer be afforded the Atlas firm on sales made to FLM?

A The purpose of my contact was to confirm what I had already been led to believe.

Q I want to know --

MR. MAC CRATE: Let the witness finish his answer.

Q I want to know what your purpose was in seeing Mr. Pollack. Was it to tell him that there would be no further wholesale incentive allowance?

THE COURT: You didn't let him finish his answer. He was telling us what his purpose was.

A I was led to believe that the dealership was reporting for wholesale incentives on sales to FLM. I was concerned that the dealer was not aware of our policies and was reporting falsely or erroneously and as such would have a financial exposure in the event of an audit. The purpose of my visit was to determine whether this in fact was taking place.

Q Did you say to Mr. Pollack, in words or in substance that, one, we are not going to allow you any further wholesale incentives on your sales to FLM? Did you say that?

A No, I did not.

Q Did you directly or indirectly indicate to Mr. Pollack that any further sales to FLM would not secure for Atlas the wholesale incentive?

A I told Mr. Pollack that policy as it was outlined was such that FLM was not an eligible customer.

Q Did you say to Atlas it would no longer receive incentive wholesale allowances on sales made to FLM? Did you say it?

A I said they were ineligible.

Q By that you meant there would be no incentive? Did you say it?

A I said they were ineligible.

Q By that you meant there would be no incentive allowances --

THE COURT: Please, this is such a waste of time.

MR. JULIEN: Sir?

THE COURT: This is a waste of time. What would ineligible mean?

MR. JULIEN: All right. Let's take his Honor's question.

THE COURT: I am asking you rhetorically. Obviously, it meant that they wouldn't get a discount.

What else do you have to ask this witness on cross?

Q In addition to that, did you tell Atlas that you were going to charge back against Atlas previous wholesale incentive allowances afforded that company on sales to FLM?

A I indicated that on any sales that were ineligible at any time the dealer was subject to charge back and on those sales made to FLM which did not qualify the dealer wasn't in danger of being charged back and probably would be as I interpreted the policy.

Q You didn't say, "probably". Didn't you say to them, "We are going to charge back to you on the wholesale allowances made, we're going to charge it back to you and you had better get it back from FLM"? Didn't you say that?

A No, I did not say that.

Q Was a charge back made against Atlas for FLM's sales which had earned wholesale incentives in the past?

A Pardon me?

Q Did you make a charge back to Atlas on FLM's sales?

A To the best of my knowledge, no.

Q Didn't you encourage Atlas to make a charge back

against FLM on these wholesale incentive allowances?

A No, I did not.

Q Didn't you thereafter, to insure that FLM would have to pay Atlas, try to arrange that no other dealer would sell the same items to FLM that it was attempting to purchase from Atlas?

A Absolutely not.

Q You had no interest in seeing that Atlas secured no recourse from FLM for these incentive allowances?

A My interest was in seeing to it that I did everything I could to assist the dealer who indicated he had a very real financial problem as a result of accounts receivables from FLM.

Q Wasn't the problem which you were assisting, a problem of getting back back the incentive allowances from FLM and didn't you, in order to assist them, see that other dealers were apprised?

A Absolutely not.

THE COURT: What was the financial problem?

THE WITNESS: Mr. Pollack had indicated that when he took the dealership, he was led to believe that FLM was a good wholesale customer of the dealership and he had done business with FLM during many years. During the course of his dealership, I think that was in July, he had accumulated accounts receivable with FLM and he had a letter, I believe, from FLM that they had certain monies coming with regard to wholesale incentives, discounts and other things, I don't recall the details, your Honor, indicating their bill would not be paid until these amounts were forthcoming.

THE COURT: So the problem was, in fact, that Ford had cut off the granting of the wholesale incentive allowance to Atlas on sales to FLM and that caused the dispute between Atlas and FLM as to what was owned between those parties. Isn't that the sum and substance of it?

THE WITNESS: I believe that the accounts or

accounts receivable took place before my visit, your Honor.

THE COURT: I am not talking about that. When was your visit?

THE WITNESS: Late in 1972, I believe, October or November.

THE COURT: Is it not true that at some time before that, stretching back into the summer, Ford had started to refuse or hold up the granting of wholesale incentive allowances to Atlas on sales to FLM? Hadn't that occurred?

THE WITNESS: Not to my knowledge, your Honor, no. I would have no knowledge of the reports of dealers.

THE COURT: You seem to have a knowledge of the financial problem between Atlas and FLM.

THE WITNESS: Described to me by Mr. Pollack.

THE COURT: Again, what did he describe to you?

THE WITNESS: He said that he had monies outstanding in FLM and that he was concerned in the event they were an ineligible customer and he should be charged back for the allowances, that FLM would not pay the monies owing him and he was in a rather tight cash position since he just went into business.

BY MR. JULIEN:

Q As a matter of fact, at that time when you were discussing that matter with Atlas and pointing out that they could no longer get incentive allowances on FLM Sales, Mr. Pollack said he wanted to continue his business with FLM, did he not?

A He did not. On the contrary.

Q Pollack told you that this was desirable business and he protested your saying that this customer was ineligible, true?

A Absolutely untrue.

Q Mr. Rose, I am going to show you Exhibit 32 in evidence. You are the Mr. Rose who signed this report?

A Yes, I am.

Q Have you read this report --

A May I see it?

Q Excuse me. Prior to taking the stand today, have you looked at this report?

A Yes, I have.

Q When?

A I saw this report this morning.

Q And you read it through?

A Not completely. I scanned through it.

Q Didn't you say to your superior, Mr. Rowlands -- that is your superior, is he not?

A He is the general sales manager. I report to the regional manager.

Q Didn't you say to him, after your conversations with Mr. Pollack, that Mr. Pollack could not accept the fact that these sales to FLM were not eligible? Did you say that?

A I believe I did.

Q So that he wanted the company policy to recognize FLM sales to FLM as eligible for the discounts, true? Isn't that true, sir?

A Pardon me? I would say not in the context of what I meant by that comment. He was interested --

Q Wasn't it you that proposed that Mr. Pollack seek recourse from FLM for these incentive allowances?

A I indicated to Mr. Pollack that his relationship with FLM was his business and that any recourse he would have would have to be between him and Mr. McKee.

Q Didn't you propose that he seek recourse from FLM?

A I don't believe so.

THE COURT: I have read this. What are you adding to what is in the document?

MR. JULIEN: I am attacking the credibility of the witness who is testifying --

THE COURT: If the document is contrary to what he said on the stand, I will read the document and consider the contradictions. It's in evidence.

Q Didn't you propose to your own company that in order to help Atlas securities incentive rebates from FLM that other of your dealers be notified that FLM is not an eligible customer?

A I believe I indicated there was a real danger that other dealers would be in the same position of erroneously reporting sales unless someone took action.

Q That isn't what I am asking you, sir. I am asking you whether you proposed to Ford that in order to help Atlas secure these rebates from FLM, "We had better notify other dealers before FLM to put FLM in a position where it must pay rebates to Atlas"? Did you do that or not?

A I may have proposed that. I'm not sure. I may have.

Q Didn't you, in order to implement your plan, notify your depot to tell you about any dealer who seemed to be dealing with FLM?

MR. MAC CRATE: Objection. There is no

testimony --

THE COURT: Overruled.

A Did I notify the depot what?

Q To let you know about any of your dealers that seemed to be dealing with FLM. Did you do that?

A Yes, I did.

Q When did you do that?

A It would be in the Fall of '72, November, I guess.

Q Wasn't that after you had suggested to Pollack, "Get it back from FLM" and after you suggested to your company the way to help Atlas get it back from FLM is to make sure that they are not buying from other dealers?

A May I have the first part of that question again, sir?

Q Wasn't this notification to your own depot after you had proposed to Atlas that it get back this money, the wholesale --

A I didn't propose that to Atlas.

Q This language, from Exhibit 32, Page 2, "I proposed that Mr. Pollack seek recourse from FLM and that we would extend to the dealership a note payment for an extended period of time in order for the company

to maintain its policy withouth penalizing the dealership too severely", wasn't that your proposal?

A That had to do with the amounts of accounts receivables that the dealer had outstanding, I believe.

Q Well, just listen to the previous sentence. "I pointed out to Mr. Pollack that we understood his position but in light of the company policy, wholesale incentives on sales to this account could not be approved regardless of what appeared to be a precedent established by the former dealership. I proposed that Mr. Pollack seek recourse from FLM." Isn't that what you proposed?

A As I say, as far as the financial aspect of it, that was my understanding and I did indicate to Mr. Pollack that his customer was the only person he could look to.

Q And then, didn't you tell Mr. Rowlands and Mr. Hughes, "I believe in order to assist Atlas LM in securing a recourse for the incentive monies involved, that Mr. Vogels should be informed that FLM is not an eligible wholesale customer, and have taken this action by phone on October 31."

Vogels was another dealer, right?

A That's correct.

Q You telephoned Vogels, the same day you had talked to Mr. Pollack and told Vogels that FLM would not be an eligible customer, that same day, is that correct?

A That's correct.

Q And you did that to help Atlas recover back its incentive allowances, true?

A I did that to protect Parkview Lincoln-Mercury.

THE COURT: Was Vogel a dealer?

THE WITNESS: He was a dealer-principal.

Q "I believe that in order to assist Atlas LM in securing a recourse for the incentive monies"-- that's what you said at that time.

THE COURT: If he said it, what's the point of raising your voice and going through all this? I can read.

Q Now, when you notified your depot to keep you

abreast of any dealer that was selling to FLM, you wanted to be sure that those dealers too would be aware that they could not get any of these wholesale allowances when they sold to FLM, right?

A I felt I had an obligation to become aware of any dealers who were erroneously reporting, yes.

Q You were talking about FLM, weren't you, when you notified the depot to advise you?

A Yes.

THE COURT: Really this just mystifies me. The question of whether the policy was or was not illegal of course is the question for the Court, but I would assume that if Ford establishes this policy, they will notify people of it.

Now, the question, if they do something beyond that, and say, don't sell to FLM at all, that's something else again, but you are not getting there at all.

MR. JULIEN: They are policing it to this extent. They are setting up a system where Atlas is going to get back the money and they are trying to arrange that no one else will sell to this man so Atlas can exert this kind of pressure upon him. It's right in the record and this witness is denying it. And he was the progenitor of it.

THE COURT: If it is in the record, if it is in that memo, I will read the memo, but Ithink there is a distinction between trying to let people know that if they sell to FLM they won't get the incentive allowance, and telling people, don't sell to FLM at all.

Now, the bridge from the first to the second, if you can cross that you have proved something, but if you simply prove that this witness was going around and telling people of Ford's policy, you haven't proved a thing.

MR. JULIEN: There was more to it.

THE COURT: Let's get to more without repeating over and over and over the thing that isn't more.

MR. JULIEN: Your Honor, I understood that witnesses other than the witness on the stand were to be excluded and they keep coming in.

MR. MAC CRATE: We will be very happy to exclude them.

THE COURT: All right, all witnesses will be excused.

Q Now, the action that you were taking was to put pressure on FLM to negotiate a settlement with Atlas concerning the return of the incentive allowances, true?

A Absolutely not.

Q What?

A Absolutely not.

MR. JULIEN: Your Honor, I just call your attention to a sentence here, page 4 of Exhibit 32, Mr. Rose's letter:

"By taking this action, it is assumed that FLM will be forced to negotiate a settlement with Atlas LM which will eliminate the necessity of the new dealer taking a financial loss."

Q And at the same time it was you who ordered pre-existent wholesale allowances then due be held up by your company, isn't that so?

A I believe that's true, yes.

Q Who was it that told you to call upon Atlas at the end of October or the 1st of November of '72?

A I believe that was my decision based on information that had come to me that Atlas was still selling FLM and was reporting for the incentives.

Q You would know as far back as '69, '70 that Atlas' predecessor was doing that with respect to sales of FLM; you knew that, didn't you?

A That's correct.

THE COURT: So what? '69 and '70, a different policy was in effect.

Q You knew it in '71?

THE COURT: I think defense counsel ought to be alert and object on the grounds of relevance because I don't want to undertake objections on my own account, but the questioning so often is completely unhelpful.

Q You knew that suchsales to FLM were taking place in '71 too, didn't you?

MR. MAC CRATE: Objection, your Honor.

THE COURT: Sustained.

Q And in '72?

MR. MAC CRATE: Objection, your Honor.

THE COURT: Sustained.

MR. JULIEN: I wish to make an offer of proof.

THE COURT: There is no reason for an offer of proof. Now go ahead with your cross.

Do you have any further questions of this witness?

MR. JULIEN: Yes, I have.

THE COURT: On what subject? Go ahead and ask your questions.

MR. JULIEN: I don't mean to disagree with you, sir, but I have the feeling that from what we know about this case that the record ought to be complete with respect to the pressures put upon Atlas and the

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pressures put on FLM to attempt to secure recourse from Atlas against FLM.

I think this is part of an antitrust case and the pertinent part to be brought into evidence. This is the man who did it.

THE COURT: Mr. Julien, there is a long memo or letter in evidence which you have in your hand, and in the half hour or virtually half hour you have been cross examining this witness you have adduced nothing that is not in that memo.

Now, you say that it relates to the credibility of this witness, but what you do is ask him questions that are answered by the documents lying in your hand and if he says something different then you confront him with what is in the memo.

I just have to tell you that it doesn't help me. He was asked about one question of substance on his direct, and of course I am interested in his credibility on that, but this kind of a thing you are doing to me just strikes me as a game, and I don't think it really helps, it doesn't persuade me of anything on credibility, and I might as well let you know that right now. It is just an artificial exercise. You ask him something you know the answer to and then you see if his answer

varies from it.

MR. JULIEN: Exactly, that's what credibility is all about, your Honor.

THE COURT: I am the trier of the fact and I will tell you it isn't persuading me of anything.

MR. JULIEN: All right.

THE COURT: If you can get to the point that makes some point, that is, if this witness -- if you have a document or a deposition or any other device which you want to use to draw out from him facts that he did something beyond enforce the well-known Ford policy or well known to us, that is, that he did something to try to persuade Atlas or anybody else to not deal with FLM, then that's another subject, but you are not even going to get to that subject as far as I can see.

MR. JULIEN: I am attempting not to repeat what you already have in your deposition, and to some extent --

THE COURT: I don't question your --

MR. JULIEN: And in the exhibits. But I say to you as the finder of fact that it is a very fair inference that where a man, in addition to saying you are not going to get the incentive allowance and get it back from FLM and I will go to other dealers to put pressure

on --

THE COURT: Argue that in your brief. It's all in that Exhibit 32.

Okay, any redirect?

MR. MAC CRATE: No.

THE COURT: All right, you may step down. Next witness.

MR. MAC CRATE: Mr. McKee, will you please take the stand.

THE COURT: There are no more Ford witnesses?

MR. MAC CRATE: There will be Ford witnesses, but I have a brief interrogation of Mr. McKee.

S T E P H E N M C K E E , called as a witness, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

BY ~~MR.~~ MAC CRATE:

Q Mr. McKee, in addition to any arrangements that FLM may have with Pleasantville Ford, do you or Mr. Andidero have any individual business arrangements with Pleasantville Ford?

A No, we do not have.

THE COURT: Who is the other name?

THE WITNESS: Andidero.

THE COURT: Who is he?

THE WITNESS: He is the president of FLM.

THE COURT: He is your partner?

THE WITNESS: Right, my partner. A-n-d-i-d-e-r-o.

Q Are either you or Mr. Andidero personally realizing any income from the sale of crash parts, which is not reflected in the FLM financial statements?

A No, we are not.

THE COURT: The first question was about Parkview.

MR. MAC CRATE: Pleasantville.

THE COURT: Pleasantville.

Q Mr. McKee, I show you Defendants' Exhibit CI for identification and ask you if that bears your signature?

A It does.

Q What is the document?

A The document is a customers parts order to the Ford parts division.

Q When was it prepared?

A 9-30-74. Sorry, it is dated 9-27-74.

Q September 27, 1974.

A Yes.

THE COURT: Tell me again what it is.

THE WITNESS: It is a customers parts order to the Ford parts division.

THE COURT: Executed by whom?

THE WITNESS: Signed by me on the Pleasantville account.

Q Did you have in your possession at that time the customer plate of Pleasantville?

A Do you refer to the plate at the top of this particular page?

Q That is, the impression in the upper right-hand corner.

A No, I do not have that plate in my possession.

Q Was the form furnished to you by Pleasantville Ford with that impression on it?

A Yes.

Q Was this order entered as a stock order or as a unit down order?

A As a unit down order.

THE COURT: What does that mean?

THE WITNESS: A unit down order.

THE COURT: What?

THE WITNESS: D-o-w-n, is an order placed on a daily basis as compared to a stock order which is placed on a weekly basis.

Q Do you find on the document a notation "ship or cancel"?

A Yes, there is.

Q Is that an instruction or a notation made or given by you?

A That's an instruction by me to Ford Motor Company. If the part is not in stock to cancel it at that date.

Q Is this a common practice of yours, to place orders on a ship or cancel basis?

A Yes.

MR. MAC CRATE: I offer Exhibit CI in evidence.

THE COURT: Any objection?

MR. JULIEN: I don't know what it's relevance is.

THE COURT: What's the relevance?

MR. MAC CRATE: It relates, your Honor, to Mr. McKee signing a document on behalf of Pleasantville Ford, and indicates the manner in which this business in conducted by Mr. McKee, showing the nature of the relationship between FLM and Pleasantville Ford.

THE COURT: That's also general. What does it show in the way of a relationship? What do I need to know -- I know that he still buys from Pleasantville.

MR. MAC CRATE: But he signs here, your Honor, I submit, as a representative of Pleasantville Ford.

THE COURT: So?

MR. MAC CRATE: His signature is right on this document.

THE COURT: If Pleasantville let's him sign, what difference does that make?

MR. MAC CRATE: He is in the position of acting for Pleasantville, and the question is,what is the function that this dealership -- strike dealership -- that this company, FLM, performs.

Here, Mr. McKee is acting as the agent for Pleasantville Ford. He is signing for Pleasantville Ford, and Isubmit that that -- this document is direct evidence of how FLM functions.

MR. JULIEN: If that's what he contends, I object to it. It doesn't prove that at all.

THE COURT: Well --

MR. MAC CRATE: I am entitled to have it in the record.

THE COURT: I will receive it. Objection overruled.

(Defendants' Exhibit CI was received in evidence)

Q Now, when you order on a "ship or cancel" basis and the part is not in stock at Teterboro, what do you do at that point?

MR. JULIEN: I think this is wholly immaterial, your Honor.

THE COURT: Overruled.

A At that point we take out the items which were not in the Teterboro warehouse, we then rewrite them on another order, similar to what you have in your hand -- each one of them by the way is quoted with an order number so we can segregate the num-ers from Pleasantville and we segregate those items or the items not in Pleasantville, order from whatever depot they are available from, to the FLM address.

Q And you placed a second order on the basis of what is known as "Bill to","ship to" that is bill to Pleasantville, ship to FLM, is that correct?

A That's correct.

Q Do you, in addition to placing a second order with Teterboro seek the parts from other sources?

A Only in an emergency; in other words, if we have a car which is strictly an emergency and it must be got out now. In that case we seek the part.

Q And from whom do you seek the part?

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A Any Ford dealer in the area.

Q How do you select the Ford dealer to whom you go?

A Anyone, we just dial any -- we have a pretty general knowledge of which dealer will stock a given item, so if it's Lincoln-Mercury we call Parkview Lincoln-Mercury, we call other nearest Ford dealer and then so on. In other words, we keep in the geographic area.

Q Would you define that geographical area.

A Geographic area I mean lower Westchester and Bronx.

Q Do you ever buy from junkyards?

A No, we did not.

Q Is that an alternative source of parts?

MR. JULIEN: I object to it, since he is not employing it, what difference does it make?

MR. MAC CRATE: I believe from this witness' experience he can tell us if that is an alternative source.

MR. JULIEN: I object.

THE COURT: Overruled.

A No, we do not buy from junkyards.

Q But is it an alternative source?

A For FLM, no it's not.

Q But for body repair shops is it an alternative source?

A It would be for body repair shops.

Q When you make these emergency purchases to which you have referred at what price, and what terms do you make such purchases?

MR.JULIEN: Object to it as immaterial and irrelevant.

THE COURT: Overruled.

A Generally on a ten percent over dealer cost and a 30-day payment arrangement.

THE COURT: That's the term to what?

THE WITNESS: On an emergency order, your Honor, we would call the nearest Ford dealer and normally he will charge us ten over cost, on a 30-day basis.

Q Mr. McKee, can you give us any approximation of the number of emergency orders you place in a week?

A Will you define the question a little closer, when you say emergency orders you mean placed on other Ford dealers or on Ford Motor Company?

Q On other Ford dealers.

A Only other Ford dealers? I would say maybe three or four a week. I don't really know.

Q It's in response to particular requests of

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body shops?

A Well, a part where the customer is in really in dire need of the car immediately, we will try immediately, regardless of who he is or what he needs. You know, we may even call one per day, but I don't think it would average more than one a day.

Q Now, there has been testimony, Mr.McKee, that there are 10,000 crash parts. How do you select which of these you will stock?

A Actually by the movement of the part, by the number of calls we are getting for the item, and from the experience of knowing from looking at a car exactly what will smack up in a crash.

Q Now, approximately how many different parts do you stock?

A I haven't the faintest idea.

Q Can you give us any approximation of how many different models of cars which you stock?

A We are covering every model back to, I could say back to '65, but we are not covered completely for '65, '66, '67, but we are covered from '68 up.

Q That you have some parts for models from 1968 on, is that what you are saying?

A Yes.

Q But by no means a complete line for each model?

A Well, we would have complete coverage for the late models on the front end damage but not complete coverage on rear end damage.

Q And how many items are there for the front end damage, just so that we have a notion of the kind of stock that you are carrying?

A It would be impossible for me to enumerate them. You know, when you go into front end damage you are talking of a bumper which may in some cases, a Ford bumper bracket may in some cases have two so now you have three items to put a bumper on one car compared to five or six on another car, you may have a grill with three or four brackets whereas on one car it might not have any, so it's difficult to enumerate how many parts would hold a particular grill on a car.

Q Are you speaking, however, of 50, 100, 200, something in the order of 500?

A Let's say we are stocking all the items which we consider necessary to repair the front end of an automobile in the Ford range of course.

Q Can you give his Honor any approximation of how many parts that would be?

A I wouldn't try to guess it.

Q Now, does the fact that a part is incentive bearing effect your decision as to whether or not you stock that part?

A No, it has no effect on it whatsoever.

Q Do you stock crash parts for compacts?

A Yes, we do.

Q To your knowledge, are there or have there been any other businesses in the New York metropolitan area engaged regularly in the purchase and resale of crash parts from Ford and Lincoln-Mercury dealers?

A I believe there was one other.

Q Can you identify that for us?

A That would be Bernard's Auto Parts but in a different category because Ibelieve at no time did he ever have an inventory of parts.

Q Were there any other distinguishing features between his business, Bernard's business, and FLM's business?

A The only distinguishing feature Ibelieve is that he does not maintain an office, that he picks up from any given dealer anywhere in the area and delivers directly to the customer from the dealer.

THE COURT: Where is Bernard's located?

THE WITNESS: It's in the Bronx, your Honor. I would not know the correct address.

THE COURT: I guess that is the first mention of anything approaching a competitor of FLM, so let's go into that.

BY THE COURT:

Q How long have they been in business?

A I would say he's been in business since 1949 or 1960.

Q And he deals in crash parts?

A Actually, I am not fully aware of what he deals in, but at one time I did supply him in the dealership I worked in, so I was aware he was supplying crash parts to some body shops.

Q And you don't know whether he deals in other parts in addition to crash parts?

A I have no way of knowing.

Q Do you know whether he deals in crash parts other than Ford cars?

A I would not know.

Q And you don't believe he carries an inventory?

A Not that I am aware of.

Q He just buys from sources he can get the parts from and then sells to body shops?

A Correct.

Q Does he go to Teterboro and pick up parts at

that depot or similar depots?

A Not that I am aware of.

Q And do you know what financial terms he gets?

A I have no way of knowing whatsoever.

Q Do you know anything about the volume of business he does?

A None.

Q Does he buy from one Ford dealer and then sell to another Ford dealer?

A I would not know.

Q Is he still in business?

A I have not seen the man in many years, so I can not say for sure.

Q When was the last time you heard of Bernard's Auto Parts?

A The last time -- well, let's say the last time I have seen the man I think was three years ago.

Q That was the last time you heard of him being in business?

A Actually, I have one customer who calls me up and jokingly says, "Is this Bernie?" every day.

Q Aside from that, though?

A Aside from that, no, I do not. I would say the last time was three years ago when I saw him at a

particular body shop.

THE COURT: Let's proceed.

BY MR. MacCRATE:

Q Mr. McKee, FLM does business in parts other than crash parts, does it not?

A Well, if you are getting into the definition of what is a crash part, this is something like we do other -- we do business in parts which Ford Motor Company may not consider crash parts, if that's the question you are asking.

Q Can you give us any approximation of the portion of your business that is in parts other than what Ford classifies as crash parts?

A I consider all our business to be crash parts.

Q Well, do you include in the parts that you buy and resell any Ford-branded parts?

A Yes, I would say so.

Q Any Autolite or Motorcraft-branded parts?

A Yes.

Q From whom do you purchase such parts?

A From Ford Motor Company, or through the dealer, through Pleasantville Ford at this particular moment.

Q Can you give us an approximation of how many customers FLM served in each of the past three years?

A I would say approximately 230.

THE COURT: Over what period of time?

Just what was your question?

MR. MacCRATE: In each of the last three years.

THE WITNESS: I would figure 230 per year. It's general.

Q Would that be in general the same numer in each of the years?

A Right. It's held pretty close.

Q Where are they principally located?

A Basically Bronx and lower Westchester.

Q Do you have any rule as to the distance from Yonkers that you will attempt to sell or serve cusomers?

A Yes, we confine ourselves in an area which can be covered economically by our drivers.

Q And how do you define that area for practical application as you are conducting your business?

A For practical applications we go as far north as Port Chester, come across by White Plains and down through Dobbs Ferry. We consider that the general area which we cover, north. South, we come as far down as the Hunts Point in the Bronx.

Q Do you arrange for telephone listings in particular classified directories?

A At one time, originally, when we started, we were listed in all the directories, all the directories in Westchester, all the directories in the Bronx, and also in the Manhattan directory.

Q But you haven't continued that?

A We haven't continued that general listing.

Q Included in the parts that you stock and sell are such items as headlights?

A Yes.

Q And filters?

A Oil filters we do not normally stock for sale; we stock them for use of our own vehicles.

Q Are headlights considered crash parts by the trade?

A Yes.

Q Who are the manufacturers of headlights, if you know?

A I would not know who manufactures them for Ford.

Q It is a competitive item though, is it not?

A A headlamp? No. A headlamp is not a competitive item.

Q A headlamp is not a competitive item?

A No, sir.

Q What trade name do the headlamps bear that you market?

A I believe you you could define what you mean by the headlamp--I believe you are referring to the sealed beam not to the headlamp.

Q Well, take the sealed beam first and if you would identify the trade name that appears on lamps that you sell?

A On the sealed beam itself, I believe normally it has been GE, I believe. I don't look at these things. I sell a part number, really, not a part.

I really sell a part number which fits a given part of an automobile. In many cases I don't even see the part.

Q You distinguished between a sealed beam and a headlight?

A Yes.

Q What do you include in a headlight?

A It's not what I include. It's what Ford Motor Company included. In a headlamp, they normally include the base of the headlamp, retaining ring and the sealed beam retainer and the spring and usually a couple of adjusting screws.

Q Do any of those items bear a trade name?

A Not that I'm aware of.

Q One question regarding your business with Central and Atlas. Under your arrangement with Central and then with Atlas, did you then take credit in making payments to Central or to Atlas for wholesale incentive for which the dealer had not yet filed a claim?

A The incentive was taken and written on the statement by the dealer. I would not know if he had already filed his claim at that point.

Q Did you not prepare the documents upon which the claim was ultimately filed by the dealer?

A Yes, we prepared them.

Q Did you not send your check to the dealer with those claim forms?

A No, I don't think the check was mailed at the same time as the claim forms. I would not be positive of it. I doubt it very much that we would mail the check at the same time.

Q At no time in the course of your relationship with Central? Would that have been true?

A If the check was included with the claims forms, it would probably not be in the total amount of the statement. It would be in an amount which we thought would reduce the payment at the end of the period of 30 days.

Q And you would take credit for the wholesale incentive that you thought the dealer might ultimately receive?

A Only after it had been removed from the statement by the dealer. In other words, the dealer's statement would show the total amount of purchases incentives.

Q This was whether or not the claim had gone into Ford at that time?

A Yes, but I wouldn't know if the claim had gone to Ford. I would have no way of knowing if the dealer had made the claim to Ford.

MR. MAC CRATE: I have no further questions.

MR. JULIEN: NO questions.

THE COURT: You may step down.

Next witness.

[Witness excused.]

C H E S T E R H A C K E W I C Z , being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Hackewicz, by whom are you employed?

A I'm employed by the Ford Parts Division, the Ford Motor Corporation.

Q Of the Ford Motor or Marketing Corporation?

A Ford Marketing Corporation.

Q In what position?

A As the distribution center manager in Teterboro, New Jersey.

Q How long have you been in that position?

A Since May 1966.

Q Would you explain your responsibilities in that position?

A Essentially, I had a facility comprising a half million square feet in which automotive parts are received, stocked and distributed to franchise Ford dealers and warehouse distributors.

Q For what activities at Teterboro are you

responsible for?

A Essentially for the administrative activity, office operations which includes order processing, the warehouse operations which is the physical aspect of the parts and picking orders and lastly, the traffic operations which handles the transportation of the material to the respective dealers that order them.

Q Would you identify what types of orders you fill?

A There are essentially three types. The stock order, the unit down order and critical order.

Q Would you briefly describe each one?

A The stock order is an order which can be submitted by the dealer weekly, once a week on a prescribed date. It usually comes in the form of a stock order pad and carries a 5% discount. The order is shipped within 72 hours of its arrival at the distribution center. The unit down order is an order that can be placed daily without limit. In other words, more than one order can be placed per dealer per day. It is priced at dealer net and shipped the next day after receiving the order. The critical order is an order that is shipped the same day it is received and carries a 10% surcharge above dealer net.

Q I show you Defendant's Exhibit CI. Are you familiar with that type of form?

A Yes, I am.

Q Is that particular form usable for other than a unit down order?

A Yes, it can be used for a stock order.

Q Are supplies of this form available to Ford franchised dealers?

A Upon request, yes.

Q Are those requests made to your depot?

A Yes, they are.

THE COURT: You say that is a unit down order?

THE WITNESS: Yes, sir.

THE COURT: It can also be used for a stock order?

THE WITNESS: Yes, sir, the form 10.

Q What specifically controls whether an order qualifies for a stock order discount?

A It has to be submitted weekly on the day prescribed and so identified by the dealer.

Q The day prescribed for that dealer?

A Yes, sir.

Q I show you a pad and pages from that pad which have been marked Defendant's Exhibit CJ for

identification, and ask you if you can identify that material for us.

A The pad is our current stock order pad, sent to the dealers upon request, and I presume the pages are those in the beginning of the pad.

Q Would you identify what the pages are?

MR. JULIEN: Is this an exhibit in evidence?

MR. MAC CRATE: I would like to offer it in evidence and am laying the basis of it.

MR. JULIEN: You have a copy?

THE COURT: Let's not have a conference. Is there a question?

MR. MAC CRATE: I have asked the witness to identify the pages that are a part of Exhibit CJ for identification.

MR. JULIEN: May I inquire of counsel whether we have a copy of this so I can follow what is going on?

MR. MAC CRATE: I have seemed to have handed multiple copies to the witness.

[Handed to Mr. Julien.]

A The first page is apparently a reproduction of the -- the page I am holding in my right hand is a reproduction of the first page in the stock order pad. It's identical.

Q Those are the general instructions?

A Yes. The second page gets to the detail use of the pad. The pad comprises strips labeled 1 through 4. This is for four weeks' worth of ordering.

In other words, the pad is in a sense the four-week pad. The dealer will tear off the strip for the first week and attach that to the strips onto which he has ordered specific parts on the succeeding pages. This provides the identification of the dealer, his code and any other information that may be pertinent to shipping.

Q I believe you will find, Mr. Hackewicz, the third page is a page picked at random.

A Yes, identified as Page A1, which at the very beginning identifies the part numbers listed in the stock order pad. The stock order pad comprises approximately 19,000 different part numbers which are a combination of Class A fast moving parts, and some Class B parts, which is slow moving.

MR. MAC CRATE: I offer CJ in evidence.

MR. JULIEN: I have no objection.

THE COURT: Received.

[Defendant's Exhibit CJ received in evidence.]

Q Mr. Hackewicz, have you at my request investigated whether Pleasantville Ford is presently using the form of order, stock order pad about which you have just been testifying?

A Yes, I have.

Q What did your investigation disclose?

MR. JULIEN: I don't see the relevance of this with respect to our plaintiff, what this party is doing. It is not binding upon us.

THE COURT: What is the relevancy of the particular pad?

MR. MAC CRATE: The question was earlier raised, your Honor, as to the availability of the stock order discount to Pleasantville in connection with purchases made for FLM to fill FLM's requirements and I believe we can show what has been the experience with respect to the use of the stock order by Pleasantville.

THE COURT: Is the stock order discount available to Pleasantville for any orders Pleasantville places on the stock order form on the prescribed day with a request that an order be filled 72 hours later?

THE WITNESS: The 72-hour provision is automatic.

THE COURT: Is that discount under those circumstances available to such orders placed by Pleasantville?

THE WITNESS: Yes.

THE COURT: Isn't that the end of it? Is there any question about that?

MR. JULIEN: I didn't understand that was the issue at all.

THE COURT: I don't understand that is in issue. If that's the point of putting in CJ, let's take it out.

MR. MAC CRATE: It goes beyond that, your Honor. There has been a connection with the damaged items this question laid, and I want to put to rest --

THE COURT: It is now at rest. Is that the only point of CJ? Let's strike CJ then.

MR. MAC CRATE: Your Honor, I would like to ascertain from this witness whether this form of stock order pad is being used by Pleasantville. It is an available form.

THE COURT: So?

MR. MAC CRATE: If it is not being used by Pleasantville, it seems to me to destroy any contention that FLM has been deprived of availability of stock order discount.

MR. JULIEN: It isn't being contended by the --

THE COURT: I assume now that Pleasantville Ford could, if it uses the right procedures, get the stock order discount. In dealing with the damage, I think I ruled the matter of the stock order discount is a matter between Pleasantville and FLM and there is no evidence that Ford deprives Pleasantville of that. We are wasting time. I am going to strike Exhibit CJ. Let's go onto something else.

Q Mr. Hackewicz, do you also receive orders by means other than the two types of orders that I have questioned you about?

A Stock orders or other type orders?

Q Do you receive orders for parts in any other manner?

A Yes, we do.

Q What are those other ways in which you receive orders?

A Direct telephone calls placing orders to our phone order clerks, recording of orders and electronic

secretaries, written orders such as this exhibit [indicating].

Q Would you just identify it?

A I believe that's CI and lastly, we have a number of dealers who have a computer terminal that permits them to place orders directly into our computer.

Q I show you Defendant's Exhibit CK for identification and ask if you can identify that document.

A Yes, I can.

Q What is it?

A It is an order phoned into the phone order clerk on September 25th, 1974, identified as Pleasantville Ford, Code 3777, with the request to ship FLM collision parts in Yonkers, New York. The order comprises of 24 line items. It is a unit down order.

THE COURT: What is the date?

THE WITNESS: September 25, 1974.

Q By whom is that document prepared?

A This particular document was prepared by a phone order clerk who took the order over the telephone. It is subsequently key punched, was key punched and the data placed in the key punch card, that is, the data identification, the type of order, the date, the part numbers,quantities of each and the cards are subsequently

introduced onto the computer for the preparation of the shipment.

Q For the preparation of --

A For the shipping document.

MR. MAC CRATE: I would offer into evidence Defendant's CK.

MR. JULIEN: No objection.

THE COURT: What is the point? I get mystified by the relevancy of those order forms. What is the relevancy of CK?

MR. MAC CRATE: Your Honor, I wish to trace the order through the shipping and through the invoicing so that we have a record of just how this process operates because that is fundamental to any understanding of the overall record that has been made here in this last week.

THE COURT: In what way? There is no contention that FLM is unable to buy from Pleasantville at terms set by Pleasantville and I assume if that can be done, then there is a procedure for making orders known to Ford and fulfilling the orders. Otherwise, there wouldn't be any volume of business at all, there wouldn't be any sales. That isn't an issue in the case. For me to hear about the mechanics of the orders, I haven't the

foggiest idea how that's going to help.

MR. MAC CRATE: Your Honor, among the documents that have been marked by the plaintiffs as Plaintiffs' Exhibit 102, there were contentions made with respect to that document, I challenged its introduction, and the only way that the nature of that document can be understood is by --

THE COURT: What is Exhibit 102? Let me see it.

MR. MAC CRATE: I misspoke, your Honor. It is 103 to which I would like to direct the Court's attention.

THE COURT: This is a customer request for credit or return parts and accessories. Before we get into a long history of order procedures, what is the contention you made on the basis of this document, Mr. Julien?

MR. JULIEN: This was one of the several things which I had offered to show the indirect purchaser relationship between FLM and Ford.

THE COURT: What is your intention? This document is dated what, February --

MR. JULIEN: February 1973, and it indicates this transaction directly with FLM collision parts.

THE COURT: What transaction directly?

MR. JULIEN: A rebate, return for failure to deliver a particular part, and both in the marking and in the handwritten part it is FLM collision parts to whom that return is both directed and made, and this, your Honor will recall, was a document emanating from Ford Motor Company.

MR. MAC CRATE: Your Honor, I will point out there is something blocked out in the right-hand corner.

MR. JULIEN: That doesn't change the purpose.

MR. MAC CRATE: The witness can identify very specifically what there is involved.

THE COURT: All right, go ahead. I will receive Exhibit CK. We will have a recess.

[Defendant's Exhibit CK received in evidence.]

[Recess.]

Q Mr. Hackewicz, to what use do you put computers with respect to inventory control and the determination of the availability of stock?

MR. JULIEN: I think that's immaterial and irrelevant.

THE COURT: Sustained.

MR. MacCRATE: Your Honor, there is a very serious question here about the adequacy of this record if we are not permitted to show just how these are orders are processed.

THE COURT: Why don't you just ask hom? I didn't know that that last question had anything to do with the processing of orders.

How do you process orders?

(no response)

THE COURT: How do you process orders?

THE WITNESS: I am sorry, I thought you were addressing something to him.

Orders are processed essentially on to the computer. The computer that we have at the Teterboro location is part of a network of computers throughout the entire nation. Each is interconnected among the 21 locations that we have through a central computer in Detroit.

The central computer in Detroit carries the inventory and approved codes for all of our customers. I am sorry, the inventory in the centers as well as the approved codes for the customers.

Q And what are the steps in the processing of orders from the point that the punch card is prepared?

A The punch card is prepared to identify the dealer code, the method of shipment, the type of order, the date as well as all of the part numbers and the quantities of each.

In addition, it will contain such data as Bill To, Ship To information where this is different than received for the code,and any other related data.

The cards are placed on the computer and the computer digests the information.

It then interfaces with the computer in Detroit, identifying those parts that are inventory, for example, at my location, it will print a shipper at my location with all of the data that was inputted, in addition to any other data that the computer may put on relative to this particular order.

Q Now, you have referred to a shipper. I show you Defendants' Exhibit CL for identification, and ask you if that is the form to which you have just referred.

A Yes, sir. It's essentially a two-part form. The first part becomes the packing slip, which is the light sheets and the last part, the second part, is the pink copy that we retain for our records.

MR. MacCRATE: I offer this in evidence, your Honor. In invite the Court's attention to the labels on the top which can be torn from that document and which will in due course be related to what appears on Plaintiff's Exhibit 103.

THE COURT: Well, isn't it just the simple fact, and I think we have already had it, that a dealer can place an order and direct Ford to deliver to wherever it wishes the delivery to be made; right?

THE WITNESS: Yes, sir.

THE COURT: And why do we need a form to show that?

MR. MacCRATE: That form, your Honor, shows the origin of the tab that has been fastened to Exhibit 103.

THE COURT: Okay.

You know, even on the face of 103, FLM appears because FLM was the party being shipped to. I think we knew that all along. We labor these simple points.

Exhibit CL is received. We have a great big

exhibit to show a tiny little point.

(Defendants' Exhibit CL was received in evidence.)

xxx

THE COURT: Are you familiar with this form which is Exhibit 103?

THE WITNESS: Yes, I am.

BY THE COURT:

Q Why does the name FLM appear; can you just tell me very quickly?

A I don't know why it appears. I know from where the source of this particular item--

Q Where?

A It appears--can I have the other exhibit back?

MR. JULIEN: This last one?

THE WITNESS: Yes, the one we just had.

A (Continuing) The shipper form is prepared by the computer and the computer will automatically prin t Bill To Ship To information here--there are actually four parts across the top of the shipper form. One is designed to be retained, this portion here (indicating) with the packing slip. The other three are to be used by our pickers who pick the parts as address labels.

Q And so there is an address label, a Ship To label that has been obviously stuck on Exhibit 103?

A Yes, it's a shipping label.

BY MR. MacCRATE:

Q And what would appear under that information on Exhibit 103 were that label not concealing what is beneath it?

MR. JULIEN: I object to that.

THE COURT: Overruled.

A Normally, the dealer would have a card, an imprint-type card, similar to a credit card, which he will imprint in place of this particular shipping label. I think one of the previous exhibits showed that in the order from Pleasantville. I don't remember which one that is.

Q Are you referring to the impression that appears on Exhibit CI?

A Yes, I do. This particular impression here (indicating).

Q Now, picking up, if you will, Mr. Hackewicz, with respect to the preparation of a Form 340, while we are speaking of that, what is that form?

A This is a --

MR. JULIEN: Which exhibit is that, please?

THE COURT: 103.

A (Continuing) This is a form used by dealers

and distributors to apply for credit for certain actions, for example, the part which they received may not have been the part that they ordered. It was picked in error, for example.

They would return the part and so describe the action on the form. We would identify upon receipt the dealer who sent it to us, check it against our shipper, make our analysis. If the error was proved to be correct, then we would accept the part and give the dealer credit for the part he did not get.

There may be an occasion where the dealer just chose to return the part because he had an excess, he ordered it and didn't require it, in which event he would use this form to return the part and upon finding it to be acceptable, we would credit him for the cost of the part.

There are other reasons, such as damaged parts or other related things that the form could be used for, but it is generally an application form for some action.

Q In due course youact upon it locally and report to your accounting group with respect to whether a credit should or should not be given?

A Normally, this is true. In this particular

one, the part allegedly was shipped from our Charlotte distribution center so the form would have been sent to them for credit.

Q And they in turn would advise the field accounting facility as to whether or not a credit should be given?

A Yes, they would approve it if they found it to be eligible and forward it to the field accounting department, which in turn would apply credit to the particular dealer's code.

Q Returning, Mr. Hackewicz, to the processing of orders, you were speaking about the preparation of the punch card. After the punch card is prepared, how is it then processed?

A The orders prcoessed?

Q Yes.

A The order coming up in the form of a shipper, once more, permits this document to be sent to the warehouse.

THE COURT: The Exhibit CL?

THE WITNESS: CL, right.

A (Continuing) The document would obviously contain part numbers and their locations. The picker would be given one of these to pick the order. He would

then go to the various locations, identify the part number in that location, look at the quantity requested column, pick that quant-ty, then put this all together in a box. He would then send it to the shipping dock for further processing. This would be either Will Call Pick Up by a dealer or Ship Out by our traffic department by normal commercial means.

Q How are Will Call orders processed at the shipping dock?

A At the shipping dock. They are received at the shipping dock in an open fashion, in other words, it is not sealed.

One of the requirements of a Will Call pickup is to identify the parts specifically on the dock at the point title passes.

Q What are your requirements as to when a customer may make a pickup?

A The requirements are that he must furnish a card, a plastic card similar to a credit card, which identifies the particular dealership which chooses to make the pickup.

Q My question was, is there a requirement as to when a pickup may be made?

A Yes. Dealers, for obvious practical problems,

are given a specified time during the day to make the pick up.

Q What is the order of magnitude of the number of pick ups made in a day at Teterboro?

A We have 134 dealers who irregularly pick up each day, that is, not all 134 come in every day. But they are eligible to come in, or their appointed representatives.

Q And you specify the time that they may pick up?

A Yes, we do.

Q Just as a matter of traffic control, I assume?

A Yes, sir, from a practical standpoint.

THE COURT: Can someone designated by the dealer, for instance his body shop customer, in that body shop, come pick up the parts at Teterboro?

THE WITNESS: Yes, he can.

THE COURT: And what kind of authorization or identification does he have to have?

THE WITNESS: The card is the most traditional way of performing that action. However, if we were given a written letter by someone saying I authorize so and so to pick up this for me then we dothat too.

THE COURT: Now, if a dealer had -- could

the dealer be supplied with enough cards to give cards to its customers?

THE WITNESS: Yes.

THE COURT: So they could go over to Teterboro?

THE WITNESS: Yes, they can, and several of them do.

THE COURT: Several of them do.

THE WITNESS: Yes.

THE COURT So you have several body shops picking up at Teterboro that have been given cards by their dealers?

THE WITNESS: No, I wouldn't say body shops. I know of no body shops. I have other customers, dealers have customers other than body shops that they choose to pick up.

THE COURT: What kind of customers?

THE WITNESS: It might be a fleet customer that they have sold to -- this is rare, it's not on a regular basis.

THE COURT: In other words, what I am talking about is rare?

THE WITNESS: Yes, it is uncommon.

THE COURT: It's uncommon but it does happen, you've got some fleet customers maybe?

THE WITNESS: Yes, simply because of proximity, it may be closer to our location so they would choose to pick up.

THE COURT: Do you know of a situation where body shops come in?

THE WITNESS: I don't know of any specific locations, but I wouldn't exclude them.

THE COURT: In other words, it could be done?

THE WITNESS: Yes, it could be done.

THE COURT: Inother words, if for the sake of convenience a dealer wanted to give a card, an identification card to a body shop, and it was convenient to have it handled that way, you would honor that card?

THE WITNESS: Yes, we would.

THE COURT: Or a letter of whatever identification you felt was authentic, right?

THE WITNESS: Yes.

THE COURT: Okay.

BY MR. MAC CRATE:

Q Mr. Hackewicz, I show you Defendants' Exhibits CN and CO for identification and ask you if those are the authorization cards to which you have just referred?

A Yes, they are.

Q Would you identify first CN and then CO?

A CN is a plastic card which we used from, I believe it's January 1967 up to January or December 1971. That card was then superseded by the one shown in Exhibit CO which is the one in use now.

Q Does the user's name appear on the card?

A No, it does not.

Q What does appear on the card?

A Three essential pieces of information:

One, the dealer code, the issuing dealer code, to the location that issued it, in this case identified by No. 23, my location and another number indicating the successive number of card issuance, in other words, it would be one, two, three, four, depending on the number of cards requested by the particular dealer.

Q Now, are cards such as that carried by individuals who come to your dock in Teterboro?

A Yes, they are.

Q And this is their means of identifying themselves?

A Yes, sir.

MR. MAC CRATE: I offer CN and CO in evidence.

MR. JULIEN: No objection.

THE COURT: All right, received.

(Defendant's Exhibits CN and CO were received

in evidence)

Q After the parts have been picked and packed and delivered to the dock for will call or delivered to common carrier for shipment, what record is made of the fact that the order has been filled?

A The pink copy of the shipper then is returned to our office operations, the order processing section, and a card is prepared, an order confirmation card . This card is introduced into the computer to allow it to trigger the billing procedure associated with that particular order.

The computer in Detroit, that is.

Q It updates the information in the computer to reflect what actual parts have been shipped, is that it?

A Well, actually the information is on the computer. It merely corrects anything that the computer did not have to begin with. At the time of shipper preparation, that data is retained in the computer memory bank so it knows that it has an outstanding order in suspense for a particular dealer given the quantity, the part numbers of each. That information is there.

To trigger this data into the form of the billing invoice requires the confirmation card that that

order has been processed. Should there be a denial of one of the parts, however, that, you know for some reason that the warehouse could not find, at that point another card would be introduced behind the confirmation card essentially telling the computer not to bill the dealer for that particular part.

Q In a normal day at Teterboro, how many line items are processed?

A During the month of September, we processed on the average daily basis, 33,000 line items.

Q Approximately what percentage of shipments out of Teterboro are by common carrier and on a will call basis?

A Well, no shipments are made on a will call basis, those are just pickups. All shipments are made by common carrier. You are thinking of total volume.

I guess your question is how many of the 23,000 lines are picked up as opposed to being shipped out?

Q Yes.

A About fifty percent of our line items are picked up and the other fifty percent are shipped out.

Q What part, if any, do you play in Teterboro in the billing of customers?

A No specific billing function with the excention of providing the computer with the means of identifying-- or the means of substance of the order and subsequent confirmation that the order has been shipped, but all billing is done by the computer in Detroit.

Q Can you tell us approximately how many orders are processed each day at Teterboro?

A Yes, during the month of September, we have averaged 2,200 orders daily.

Q And is that on a five, six or seven-day week?

A Five day week.

Q A question has earlier been raised, Mr. Hackewicz, as to the delivery of stock orders.

Are there any restrictions on the place to which stock orders may be delivered?

A No, there is no restriction. The dealer can give us a bill to address different -- ship to address rather, different than his bill to address.

Q Have you considered what would be the additional burden on your facility were Ford Marketing Corporation to sell parts directly to jobber-wholesalers?

MR. JULIEN: I object to this.

THE COURT: Overruled.

MR. JULIEN: On the ground of competency.

THE COURT: What?

MR. JULIEN: On the ground of competency. May I have a preliminary question?

BY MR. JULIEN:

Q Did you make a study with respect to this?

A Briefly.

Q When?

A In the last 48 hours.

MR. JULIEN: I object.

THE COURT: Overruled.

Q How many franchise dealers do you presently serve or face with respect to fast moving parts?

A 436.

Q And would you explain to his Honor the way in which you use the word "face"?

A It's essentially used in the context of geographics. There are 20 active parts distribution centers that Ford Motor Company has in the country. Each of these is geographically apart from the other. Within its own geographic area all dealers and distributors would order parts from that particular location. This is known as being faced by that location.

Q How many franchise dealers do you presently serve or face with respect to slower moving parts?

A This is in addition to the Class A or fast moving parts. It would be 1,000 additional dealers.

THE COURT: Now you've got -- what's the 300 to the 400 figure?

THE WITNESS: The 436 number were those in my immediate vicinity that come to me for both their fast and slow moving parts.

In addition, Iwill ship slow moving parts to the dealers faced by the Boston vicinity, the Pennsauken, New Jersey facility and the Richmond, Virginia facility, the latter three comprise 1,000 additional dealers.

Q Would the wider facing area be referred to as the Class B facing area?

A Yes, and our designation, Class B identifies the slower moving parts.

Q Mr. Rowlands has testified thatthere were approximately --

MR. JULIEN: I object to his telling him what another witness has testified to.

THE COURT: I haven't heard the question. I don't know whether -- no, I can't. Overruled.

Q Mr. Rowlands testified that there were approximately 3,300 independent jobber-wholesalers in your Class A facing area.

What problems would you anticipate from having to serve such an additional number of jobber-wholesalers?

MR. JULIEN: Excuse me.

If your Honor please, not only is this irrelevant and could not constitute an appropriate defense in this case, but there is no reason to believe that each and every person running a parts store is going to become a Ford crash dealer.

I object to that question.

THE COURT: What was the figure? What was the figure that Mr. Rowlands mentioned?

MR. MAC CRATE: 3300.

THE COURT: And that 3300 was what?

MR. MAC CRATE: In facing area A.

THE COURT: Selling?

MR. JULIEN: Automobile parts.

THE COURT: Selling parts of all kinds?

MR. JULIEN: Yes.

MR. MAC CRATE: Yes, your Honor.

THE COURT: Well, I'll allow it.

Q What problems do you see, Mr. Hackewicz, in serving that additional number of jobber-wholesalers?

A Well, the sheer number of 3300 is an eight-fold increase over my current 436 dealers and presents somewhat

of a frightening situation.

MR. JULIEN: I move to strike that out.

THE COURT: Yes, we are not worried about whether it's frightening. What's the practical problem?

THE WITNESS: The practical problem is what leads me to be frightened. First of all, I have 134 of the 436 dealers that will call daily. And that wouldbe 31 percent of 436. If I apply the same ratio of 31 percent of the additional 3300 dealers, I will pick up 1,000 more will-call dealers for a total of 1,134 on a straight mathematical basis. This is what is frightening. There isn't room for that much traffic nor is it practical to accept this many will-call dealers in one day.

Secondly, there is the problem of additional cost which will go up in direct relationship to the dilution of the number of line items per order, and I will qualify that.

I testified that we in September averaged 2,200 orders a day and processed 22,000 lines per day. This works out to an average of 10-1/2 lines on the shipper per order. I would have presumed that if I had to ship 3300 additional customers at this point in time, that volume would be diluted so that it would likely be --

it could be no less than one item per shipper or one line per shipper but very likely would not be more than two, so that my order content would then go down from 10-1/2 lines per average down to two, which makes for a very inefficient operation in terms of my warehouse functions, since it dilutes my ability to economize because of scale.

Thirdly, I can see a problem associated with transportation for those that would not will-call, in other words, of the 1,000 or 3300 that will will-call, I still have a problem with potentially 2,300. These would be people I would have to ship to. Using my extrapolation of percentages:

The transportation cost would then increase substantially, probably in the order of four times as much as it currently is, for two reasons: One, there is a dilution of the order again, that would apply to these people, perhaps on a 10-1/2 to 2 per order basis which then gets me into a minimum shipment problem. A minimum shipment is one which I am required to pay 100 pound weight to a motor company carrier for carry an item from one location to another. If the item weighs less than 100 pounds I would still have to pay the 100 pound price. Particularly, in the days of crash parts where these are

not susceptible to be shipped by UPS or Parcel Post the only other lesser cost means I have simply, because of their size, I would have to resort to the greater use of motor carriers and more extensive use at a higher cost because of the minimum shipping requirement.

In other words, shipping a fender which weighs maybe 40 pounds would have to be done at the 100 pound price.

Q Mr. Rowlands also testified that there would be in the order of 7200 to 7300 independent jobber-wholesalers in your Class B facing area.

What additional burden could you foresee in attempting to serve that group of jobber-wholesalers?

MR. JULIEN: That question again includes a limit which cannot be possibly be anything but speculative, to wit, how many are going to be in Ford crash part businesses, these jobbers some of them operate stores with many, many items, there is no reason to believe that this total amount would have any interest whatever in this particular business.

THE COURT: Objection overruled.

A Well, I am faced with another problem here. I now in my Class B area serve 436 of my eight dealers plus 1,000 which gets me to a total of 1436 active dealers

at this time. And your statement was Mr. Rowlands indicated that would be 7200 total?

Q 72 or 7300 was the figure.

A That's a five-fold increase in the number of potential customers which gets me right into the same relationship I had in the Class A facing area with two things: One -- well three things really, two that I have covered, one would be the case of dilution of order, inefficiency associated with picking them, two would be the excess transportation costs simply because of the number of people in the diluted territory order effect, and thirdly, of course, and this applies in the first instance as well, it's the credit problem, the qualification of credit for these additional customers.

Q Mr. Rowlands also testified as to the number of jobber-wholesalers nationally, which he identified approximately 37,000.

Would the fact that Ford Marketing Corporation was selling nationally, directly to jobber-wholesalers, affect your operations at Teterboro?

A Yes, it would, but the computer will refer items that --

MR. JULIEN: Your Honor, I thought there was going to be another question. I want to take the same

objection to all this line of testimony.

THE COURT: Overruled.

A The computer will occasionally refer an order or a part of an order to my location from as far away as tne San Francisco distribution center simply because I may be the only one who has it in stock.

So, as the total number of customers increases from the approximately 6800 we have nationally to 37,000 additional. then I have many more potential people to ship to with the attendant cost problems of smaller orders, less efficiently picked orders and also the credit problems on a grander scale now.

MR. MAC CRATE: I have no further questions.

THE COURT: Okay, cross examine.

CROSS EXAMINATION

BY MR.JULIEN:

Q We were told by a previous witness that there was no sales promotion with respect to crash parts, that it depended upon principally how many crashes occurred during the course of the year.

You agree with that, do you?

A I didn't hear the testimony. I have to accept what you say is true.

Q All right, fine. Sc in each year the sale of

crash parts for Ford automobiles will bear relationship, will they not, to the amount of crashes and the severity which takes place on the road?

A I think that's a reasonable assumption.

MR. MAC CRATE: Your Honor, what does this have to do with the direct examination?

THE COURT: I don't know.

MR. MAC CRATE: I object on the grounds of relevance.

THE COURT: Well, maybe Mr. Julien is leading up to something.

Q And so no matter how many customers there may happen to be of Ford, the volume of parts which sold per year for crash parts for Ford automobiles will remain relatively the same, isn't that so?

A I think that's right.

Q Now, as your system presently stands, jobbers and wholesalers, some of whom you have considered in this amount of some 3000-odd or 10,000-odd, depending upon whether its local or national, some of these jobbers and wholesalers may be purchasing parts right now through some of your dealer franchisers, correct?

A They could be.

Q Where a dealer wants you to make a drop shipment

of a portion of his purchases to a particular location, your company does that, does it not?

A It depends on what you mean by portion. We do not split up an order.

Q Well, all right.

A We will ship an entire order.

Q You will ship an entire order put to you or given to you by a dealer to a particular location which he chooses, which may well be one of his jobbers purchasing from him, isn't that so?

A Yes, sir.

Q And to that extent, even now, your sales can be broken up per order at the request of the franchise dealer?

A Not per order.

A No, I mean each order may be directed to another location.

A Yes.

Q In addition to that, with respect to each order, your franchised dealer may tell you this is to be picked up by one customer of his or another customer of his, true?

A Yes, in a formal matter.

Q And you are able to handle that in the setup that you presently have, correct?

A With the few that we have, yes.

Q One dealer can have three or four orders, each of them with a different will - call person to pick up, isn't that so?

A He is given the one will - call pick up time.

Q In that one will - call pick up time if he has three orders, separate orders, each may be picked up by another office' customers, isn't that so?

A Very true, if he identifies the order.

Q And you service that right now, do you not?

A Yes.

Q This study that you say you made in the last 48 hours, about what it might mean to your company if there were additional customers, did you make some notes about that?

A No. I didn't make my notes. I recall other studies in which such things as dilution of orders have

been a key part, in transportation studies. The numbers that were given to me fit very well into the formula.

Q Did you make any notes at all with respect to the subject matter of additional costs which you have been testifying to?

A No, did not.

Q That pad you hold in your lap?

A I put down the information Mr. MacCrate gave me in terms of what Mr. Rowlands has testified to.

Q Do you know the FLM Company?

A I know of them. I don't know them.

Q Besides FLM, do you know of any independent wholesaler of Ford crash parts in this area?

A No, I do not.

Q Have you or anybody that you know of ever made any survey of jobbers or wholesalers to see if they are in engaging in the Ford crash parts program?

A I have not.

Q At any rate, none has come to your attention?

A That is true.

Q By the way, did you know that this figure of three thousand odd involves people who run stores, handling all kinds of automobile parts? Did you know that?

A I presumed it would.

Q And it isn't likely that all those people would be interested in becoming Ford crash parts wholesalers?

A I'm not sure I can qualify that. They do have delivery trucks, I presume, to carry merchandise and that would be a normal extension of their business.

Q Being a wholesaler or a jobber in Ford crash parts, necessarily entails carrying an inventory of sorts, does it not?

A I wouldn't think so.

Q In order to furnish prompt service, an inventory makes the jobber or the wholesaler the more able to do that, isn't that so?

MR. MAC CRATE: A little louder, please, Mr. Julien.

MR. JULIEN: I'll try.

A You'll have to define prompt service to me. I did indicate we did have three levels of service.

Q I am not talking about your service, excuse me.

A I'm talking about our service. That suggested availability. If you order a part on one day and get it the same day, that's very prompt and --

Q There are many parts, for example, which you may not have at Teterboro and may have to secure from

some other of your terminals, isn't that true?

A Very true.

Q That can happen and has happened with respect to some of these items which appear on Exhibit CK, isn't that so?

A I can't identify it from this exhibit. Only the computer print-out would give me that.

Q Your dealer franchisers, they carry inventories, do they not?

A Not all of them.

Q Do some of them carry inventories?

A Yes.

Q And from your knowledge of the business, is that beneficial to the pursuit of their business?

A I'm not sure any more. I used to think it was. I'm not sure any more, Mr. Julien, because of the promptness of our service.

Q When you said you had looked into this matter the last 48 hours, all you did was to take the figures Mr. MacCrate gave you and then make some estimate of your own. Is that what happened?

A Pased on fairly extensive studies in the past, using almost identical data, with different numbers.

Q Do you have any of those studies here?

A No.

Q Did you consult any of those studies in preparation of the information you just gave to the Court?

A I could tell very readily from my memory of the studies in terms of order dilution. We know very specifically what each man picks every day depending on the type of order he gets.

Q What I am asking you is, did you allude to or look at these previous studies?

A No, I did not.

Q Are they available?

A Not here.

Q When did you last see them?

A We made some studies -- it's almost a continuous type thing with us. I think the last one was probably about three months ago.

Q Is that a study which was done by Ford itself?

A Done by my distribution center.

Q Where is that study located now?

A In my files, I imagine.

Q Back at the center?

A Yes.

THE COURT: Why don't you both keep your voices up, please.

Q I want to allude for a moment or two to the computer system that you have. As a result of the material fed into that computer, are you able to and can you find out by a print-out all of the items sold to any particular customer during any period of time?

A No, not by direct access that I would have to the computer.

Q You do feed this to the computer, all of the items which you have sold to a customer, right?

A Yes.

Q And I may be mistaken, but did you also say you feed into the computer where the delivery is to be made?

A Yes, sir. If it's different than the basic business.

Q This information that you computerize in this fashion, don't you have any method of retrieving the information?

A I don't. My answer to you is I don't have direct access to that information.

Q Your computer interfaces with a computer at the home office, correct?

A Yes, it does.

Q So that the amalgamation of information

secured in your computer and at the other of your depots comes into the home computer in the home office where totals can be achieved, right?

A I would presume so.

Q And that would be a recording of both customers and their purchases on these line items, right?

A For as long as the memory bank contains that information.

MR. JULIEN: That's all.

MR. MAC CRATE: Your Honor, I have just one question. I would like to introduce the shipper on Exhibit CK which was a telephone order, which shows the print-out by the computer of the particular order so that we would have it in the record for reference. It responds to a question that --

THE COURT: I think it's completely unnecessary. I'm not going to receive that. You may step down.

MR. JULIEN: If your Honor pleases, I not only consent that that be received, but I urge your Honor to receive it.

THE COURT: What is the point?

5.2am MR. JULIEN: In my brief I will be pointing out efficiently Ford can ascertain just what it sells, to whom it sells, the date and the computer system.

THE COURT: I assume that Ford can ascertain that. Of course they can.

MR. JULIEN: I am talking about this alleged danger of one dealer getting a rebate where another dealer has sold him the merchandise. I am going to show as a result of all these exhibits that it is absolutely impossible.

THE COURT: How do these exhibits show that?

MR. JULIEN: The combination of all, the identification of parts, the names of the customers, all computerized makes it possible for them to know just what they have sold to each customer and should a claim come in for a larger amount, they know at once that the computer will indicate to them that this is more than the volume sold to that customer on those line items. I urge your Honor to accept this. I will brief it, I believe, to your satisfaction.

THE COURT: All right, received.

[Defendant's Exhibit CM received.]

[Witness excused.]

THE COURT: I would say that the issue about whether a particular Ford dealer will claim allowances for more parts than he has bought or for more eligible parts that he has bought, I don't see that there is

any issue about that here at all.

MR. JULIEN: I am delighted to hear your Honor say that because the defendant is making that issue.

THE COURT: It's the issue of whether one Ford dealer will sell indirectly to another Ford dealer. The first Ford dealer will take the incentive credit and he has bought the part, he is requesting incentive credit for that part and there is no issue about him requesting incentive credits for more parts that he has bought. And, the second Ford dealer isn't claiming an incentive allowance from Ford. The second dealer is simply getting the benefit by virtue of the lower price of the first dealer's getting the incentive credit. That is what they talk about as the control question,and the problem you pose has nothing whatever to do with that.

MR. JULIEN: I have heard the contention made, your Honor, that there may be duplication of wholesale allowances . If I am wrong about that and it is out of the case, then I am delighted to know about it.

THE COURT: I don't understand there is any contention about that.

MR. MAC CRATE: There is, I believe, an

additional problem, your Honor. The next witness I would like to call is in charge of accounting for Ford parts division.

THE COURT: All right. Are you saying as part of your so-called control problem, you are afraid that a Ford dealer who buys a part from FLM or from a similar company, would claim an incentive, a wholesale incentive allowance directly from Ford?

MR. MAC CRATE: It is possible, your Honor, that two dealers trading across through an intermediary such as FLM could each be claiming wholesale incentives.

THE COURT: I suppose there is that possibility, but I really don't conceive of that as presenting any issue that I have to try in this case, for this reason: It does seem to me abundantly clear, so clear that I didn't want Mr. Julien to even brief it, that if Ford has decent accounting procedures, it can solve the one question necessary to solve that problem, namely, to determine who it sells the parts to.

Now, I would understand no circumstances allow Ford to do anything on its pricing policy in order to take care of that problem, and I am saying right here and now that I assume that Ford by the proper recording keeping procedure will know who it sells parts to.

And, that's all Ford has to know to prevent that kind of duplication.

MR. MAC CRATE: With all due respect, your Honor, I think that our next witness can shed some light on the nature of these problems.

THE COURT: All right.

W I L L I A M A . B E E R S , having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Beers, when you answer the questions, will you keep your voice up so we can hear.

By whom are you employed?

A Ford Parts Division, Ford Marketing Corporation.

Q What is your position?

A I am his assistant controller of accounting.

Q How long have you held that position?

A I have held that position since the division was formed in the Fall of 1966.

THE COURT: Your title is what?

THE WITNESS: Assistant controller - accounting.

THE COURT: Is it C-o-n-t-r-o-l-l-e-r or --

THE WITNESS: C-o-n-t-r-o-l-l-e-r.

Q Prior to assuming your present position, what

position did you occupy in either Ford Motor Company or an affiliate?

A I was the assistant controller of the Ford Division of Ford Motor Company.

Q For what period?

A From 1952 until 1966.

Q What is your educational background?

A I was graduated from Ohio State University with a Bachelor of Science in Business Administration, with a major in accounting.

Q For what operating functions at Ford Parts Division are you responsible?

A I am responsible for all the accounting and credit functions.

Q Would you list the departments in the controller's activities for which you have responsibility and briefly describe their separate functions?

A There is the field accounting department, that has the responsiblity for all the accounting transactions with the fields parts depots including the billing of shipments, receiving payments on monthly statements, paying for parts received by the depots; general office accounting department, which is responsible for the accounting transactions of the general office including

consolidating financial statements; the credit department which sets the credit limits for customers responsible for collecting accounts receivable; the incentive control and analysis section which processes and analyzes the claims from dealers for wholesale incentives and claims for redistribution and recompensation allowances submitted by our direct accounts.

Q When you refer to direct accounts, they are also referred to as warehouse distributors.

A Warehouse distributors, that's right. I have one other area reporting to me, the financial management specialist, who provides business management guidance to independent accounts on request.

Q Are you familiar with the process for billing franchise dealers for the purchases of parts?

A Yes, I am.

Q Would you briefly describe for us, step by step, the process of billing customers following the daily receipt at the computer center of merchandise that has been shipped during that day?

A When the information was received from the depot that shipment has been made, the data regarding that shipment is pulled from the tape files in the computer and an invoice is prepared showing the quantities,

the part numbers shipped. Of course, it is prepared for each dealer parts codes, shows the address of the dealer, unit price, extended amount, any stock order discount that applies and the total of the invoice.

Q There is an invoice for each order?

A Yes, sir.

Q And what is the disposition of that invoice that is printed by the computer?

A The original copy is sent to the dealer and the copy is retained by the field accounting department.

Q Based upon those individual invoices that are sent to the dealer, is there a provision for billing the individual dealer?

A These invoices are summarized on a monthly parts statement, the transactions with the dealers from the 26th of one month through the 25th of the following month, are posted to a parts statement. The total of that statement is due on the 20th of the following month.

Q Mr. Beers, I show you Exhibit G in evidence and call your attention to this page from the policy and procedure manual, and ask if that is a sample of the monthly statements to which you have just referred?

A Yes, it is.

Q On the monthly statement, what are the unit prices shown?

A Unit prices are dealer net.

Q Does the popp or surp to which there has been reference up here on the monthly statement?

A Yes. The amount of a popp allowance, that is generated by purchases that appear on the monthly statement, the amount of that allowance also appears in a column on that monthly statement.

Q Do they in any way affect the statement of the total amount that is owed on that statement?

A No, they do not.

Q Referring for a moment to the invoice that is sent out with respect to an individual order, is there any information on the invoice with respect to wholesale incentive?

A No, there is not.

Q How does a dealer get credit for wholesale incentive?

A The dealer submits a claim, monthly claim for wholesale incentive credit based on the sales of eligible parts to eligible customers that are made in that month being reported. The total of this claim is then credited him to his monthly statement and that is the

way he gets the allowance.

Q To whom are the claim forms forwarded?

A They're forwarded to the icentive control analysis section.

Q Are they forwarded by the dealer to the incentive control analysis section?

A Yes, they are.

Q And the incentive control analysis section is located where?

A It's located in the division general office in Levonia, Michigan.

Q Is that where you have your office, Mr. Beers?

A Yes, I do.

Q What steps are taken by the incentive control analysis section in reviewing such claims when they are received?

A Well, the steps that they took in reviewing the 2715 and 2715A claim were as follows:

The details of the claim, the dealer showed the invoice number, the date of the invoice and the amount of the incentive that he was claiming on each of these sales. These detail sheets were then checked, the addition and also to see the total was carried forward to the cover sheet. The cover sheet was reviewed

to see that it contained certain financial data the dealer was supposed to put on it from his financial statements. They also reviewed these claims to see whether there were any unusually large transactions that may seem unusual that should be questioned. After that, they sent these claims to the field accounting department where the totals were key punched, credit issued to the dealer and the information placed on magnetic tape so the credit could be posted to the monthly part statement.

Q Isn't there a deadline by which a dealer is to file his claim for wholesale incentive?

A These claims are supposed to be filed within 30 days of the close of the month, in which the sale was made.

Q When you refer to "in which the sale is made", are you referring to the purchase by the dealer or the resale by the dealer?

A No, this is the sale by the dealer on which he is claiming incentive. There is really no correlation between the time a dealer purchases an incentive part from us and the time he sells it and claims incentive on the sale.

Q May he claim whether he takes the part out of

inventory or acquires it and immediately resells it?

A Yes, he may.

THE COURT: In other words, the basis of his claim is resale to an eligible customer?

THE WITNESS: Sale he makes.

THE COURT: And he is supposed to file within 30 days after the month of that sale?

THE WITNESS: That's right.

Q You have indicated the processing with respect to the old form 2715 and 2715A. A new form was introduced in the form of what is known as the WINS pad, is that correct?

A Yes, sir.

Q What is the processing of that form?

MR. JULIEN: Could we know first when that was introduced, your Honor?

Q Would you state for the record, Mr. Beers, when this was introduced?

A This new claim form was introduced in January of 1972, and it's a system that is parts oriented. That is, the dealer claims for each eligible incentive part the quantity of parts that he sold to eligible customers. It is not necessary for him to expend this by any amount. He just gives us a quantity of

each part from which he is claiming. He also shows on the cover sheet certain financial information taken from these financial statements. This claim is received by the incentive control end analysis section and they review it to defect any obvious mistakes that have been made in submitting the claim. After that, they send it for key punching where the part number and quantity shown on the claim form are each key punched. This information is transmitted to a computer that calculates the amount of the claim. It issues a credit memo to the dealer and puts this information on magnetic tape so it can be included as a credit in the monthly parts statement.

MR. MAC CRATE: I will return in a few minutes, your Honor, comparing reporting of these two, but I have a few questions with respect to the code numbers.

Q To what use do you, in the accounting function, put the code numbers that are assigned to franchise dealers?

A A dealer parts code number is used to identify that dealer in all data processing transactions. It's used in ordering, used in shipping, used in billing, in credit, you know, all data processing transactions we have. This is the identification of that dealer.

Q When a second parts code is issued to a dealer, what does this permit so far as the dealer is concerned with respect to these various aspects to which you have just referred?

A Well, this permits the use of a second address, separate invoicing would be involved, separate statements. It permits the submission of separate wholesale incentive plans and the use of separate credit limits.

Q With respect to credit terms, what are the normal terms on sales parts to franchise dealers?

A Our billing period extends from the 26th of one month through the 25th of the following month, and the total of the statement is due on the 20th of the month following the close of the billing period.

However, if $2,000 or more of Autolite-Motorcraft parts were purchased in that billing period, then the total amount of those purchases are due the 20th of the second part of the month following the closing period.

Q In addition to Autolite-Motorcraft parts, what additional parts would be listed on the monthly statement?

A Ford branded would be shown.

Q What are Ford branded parts?

A These are parts that are branded with the Ford name and they are sold through our dealer terminal.

THE COURT: They are not crash parts?

THE WITNESS: They could include crash parts.

Q Are you familiar with the controls that have been established for wholesale claims incentives?

A Yes, I am.

Q During the period commencing in '68 to date, can you briefly describe for us efforts that have been made to improve the controls over claims for wholesale allowance?

A In 1968, we were using various statistical tests that we applied to dealers' claims over an extended period of time to try to relate the claims that the dealer was making to the value of the incentives on the purchases that he was making from us to help us determine those dealers that may be submitting erroneous claims.

In the summer of 1969, the management of our division were concerned because the amount of incentives that we had been paying through the year were exceeding the estimates that we had made of the incentives that were to be paid, and we received an assignment to

find out whether claims were being submitted in accordance with our policy or whether this increase was due to other factors. We applied these tests that I spoke about to the popp claiming 450 dealers, submitting the largest amount of incentive claims to us. And this flagged them about 70 dealers, where the claims appeared to be out of line with the other dealers. We did not have enough auditors in our division to audit a group of dealers in a reasonable period of time so we formed a task force and got help from the internal audit staff of the Ford Motor Company. We also got help from the auditors of the Ford Division and Lincoln Mercury Division in that they would perform certain audits for us and we wrote up uniform procedures for all these different auditors to follow this auditing, and we completed in the late summer, early Fall of 1969, 37 audits under this program.

Q Was an audit of Central Lincoln Mercury in Brooklyn one of the audits that was conducted as part of that task force program?

A Yes, it was.

Q Mr. Beers, I show you Defendant's Exhibit S for identification and ask you if you can identify the document.

A Yes, I can.

Q What is it?

A This is a recap that I made of the results of these 37 audits.

Q Do you find on that recap a reference to Central Lincoln Mercury?

A Yes, I do.

Q Would you just approximate where on the sheet it appears?

A Well, it's the eighth line from the bottom.

Q On the first page?

A On the first page.

MR. MAC CRATE: I would like to offer this analysis in evidence, your Honor.

MR. JULIEN: Would your Honor defer ruling on this.

THE COURT: We will have a recess until 2:15.

[Luncehon recess at one p.m.]

AFTERNOON SESSION

(Trial resumed)

WILLIAM A. BEERS, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. MAC CRATE:

THE COURT: Is there any objection to Defendants' Exhibit S?

MR. JULIEN: Yes, if your Honor please. I can hardly make it on the basis I cannot understand it, but with a few preliminary questions I can better understand it.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. JULIEN:

Q Is it the complete report, these two pages, or was there more to it?

A Those are all the dealers that we audited.

Q And what is the test period which you employed?

A Well, the test period that we employed was January through May of 1969.

Q And you don't express that test period anywhere by dates, do you?

A No, I don't. This was just for my own information, sir.

Q And these figures in each of the columns, are they, for example, where it says ineligible customers, is that a dollar figure?

A That is a dollar figure.

Q Is it a customer number?

A No, sir, it's a dollar figure.

MR. JULIEN: All right, now I understand.

If your Honor please, I do not object to that portion of this exhibit which deals with Central Lincoln-Mercury and it deals with them on both of the numbers which they had at that time.

I do have objection to anything else dealing with other dealers, none of whom seem to be in this area at all, concerning which we have no information.

THE COURT: May I see it?

MR. JULIEN: Yes, indeed. That's my copy.

(Handing)

THE COURT: What are meant by emergency sales? What is meant by emergency sales?

THE WITNESS: Dealers can claim wholesale

incentive on emergency sales of parts to other Ford dealers. This is where a dealer is trying to repair a vehicle and he needs a part, and he can buy it, we allow him to buy it from another Ford dealer and allow that selling dealer to claim wholesale incentive on that.

Generally, they are sales of one at a time.

THE COURT: What was meant by ineligible customers? What kind of things did you --

THE WITNESS: Well, these were various types of customers that were ineligible by our policy, ineligible customers for which the dealer could claim wholesale incentive.

THE COURT: Is this just a summary of more detailed information you got?

THE WITNESS: These are summaries that were made from the audit reports that showed the amount of disallowances from each audit.

THE COURT: Did you read the audit reports?

THE WITNESS: I probably did, yes.

THE COURT: All right, so don't you remember a little more about what kinds of -- what was the most frequent ineligible customer or type of ineligible customer; was it other Ford dealers?

THE WITNESS: I believe in the shop sales, for

example, the most prevalent type were sales to insurance companies.

THE COURT: What's meant by a shop sale?

THE WITNESS: This is where a dealer uses it in a repair in his own ship.

THE COURT: I see.

And that was distinct from a --

THE WITNESS: That's distinct from a counter sale where he sold it to some customer over the counter, that came into the dealership to buy the part.

THE COURT: In other words, if he sold an insurance company in repairing a car for the insurance company?

THE WITNESS: This would generally be a repair in his own shop,and he charged or claimed wholesale incentive on the use of the parts in that repair.

THE COURT: And that was the most frequent type of ineligible sale in the shop sale, right?

THE WITNESS: Yes, sir.

THE COURT: Now, let's take in the counter sales, what was the most frequent type of ineligible customer if you can remember?

THE WITNESS: I can't remember, sir.

THE COURT: Now, do you recall seeing instances

of sales to other Ford dealers?

THE WITNESS: These instances would be re-capped under emergency sales, where they were claiming incentive on sales to Ford dealers, but because of the quantities of the parts that they were selling to the other dealer, it was obvious that they were not for an emergency repair of a vehicle. Selling 100 spark plugs or something like that, or quantities of any part to another Ford dealer would obviously not be for emergency use.

THE COURT: And these audits would cover crash parts and other kinds of parts, right?

THE WITNESS: It would cover all parts that we sell to the dealer, yes, crash parts, other Ford branded parts, Autolite-Motorcraft parts.

THE COURT: What's the relevance of the material about all these other audits?

MR. MAC CRATE: Your Honor, it places the audit of Central Lincoln-Mercury in the proper framework. The whole context of audits going forward at that time and the particular objectives of that overall audit, the focus at the time and what was being sought by going through this, and there have been various contentions about what should have been or what was learned from the

particular audit of Central Lincoln-Mercury, and this places it into its true historical frame of reference and shows that a whole group of audits would be coming across for review at the time of the particular focus that the company had of learning certain information.

THE COURT: So?

MR. MAC CRATE: And the question of the second parts code was irrelevant to this overall investigation that was being made. And it also is the predicate for -- the predicate of information for the subsequent changes that were made with respect to control and all of these steps that I would like to now turn to in the questioning of this witness.

THE COURT: Well, I suppose insofar as it relates to the purpose of Ford in changing its policy in July of 1971, it's admissible. We are not interested in other audits per se. But we do have the question of the purpose for the July 1, '71 change as to which there has been a little bit of testimony, not really very much, and so anything that can shed light on that is fine.

I will receive it and overrule the objection.

(Defendants' Exhibit S was received in evidence)

BY MR. MAC CRATE:

Q Mr. Beers, you referred to the instructions

that were given to the task force auditors.

Did you prepare those instructions?

A The instructions were prepared by the incentive control analysis people. The people who are engaged in that particular work, men who worked for me at that time.

Q Was there anything in the instructions to the auditors about examining the propriety of second parts codes?

A No, sir.

Q Are you aware of any right of Ford Marketing Corporation to access to the records of the customers of its franchise dealers?

MR. JULIEN: Just a moment, I am going to object to whether he was aware of a right. They did in fact do it. I think that is the proof that is important not whether his conclusion about legal rights.

THE COURT: I will sustain the objection.

MR. MAC CRATE: Well, I submit, your Honor, the question of voluntary access to books is a lot different from having contractual right to examine books, and whether one particular person at one particular time of Ford's access does not any way demonstrate a right of access or that those who control Ford policy can assume that they have any right of access.

MR. JULIEN: It still isn't a matter for him to determine, this witness.

THE COURT: What competence does this witness have on it? Is he a lawyer? Does he know contracts?

I will sustain the objection.

MR. MAC CRATE: Your Honor, it relates to --

THE COURT: I will sustain the objection.

There is no showing that there was ever a request made that was denied or anything like that. Go ahead.

Q Was any action taken, Mr. Beers, in the fall of 1969 to strengthen your claims review procedures?

A Yes, there was.

Q What action was taken?

A The incentive control analysis section was formed.

Q And you have previously described the responsibility with which it has been charged.

A Well, I briefly described responsibilities. It was formed to process the wholesale incentives claims submitted by dealers and the redistributions, recompensation allowances submitted by our wholesale distributors.

Now, in trying to control wholesale incentive claims we felt there were really two levels of control.

MR. JULIEN: I think this goes beyond the question.

THE COURT: It does.

Just limit your answers to the question, please.

THE WITNESS: I am sorry

Q Mr. Beers, by whom in the Ford organization is the auditing function performed and by whom has it been performed during this period, 1969 to date?

A It was the responsibility of the incentive control analysis section to audit, to conduct field audits, up to the period in September 1970, when this responsibility was transferred to the internal audit staff of the Ford Motor Company as part of the centralization of all dealer and customer audits under that group.

Q Who decides whether an audit is to be made?

A The incentive control analysis section makes that determination.

Q And they request this central auditing facility to then make an audit?

A Yes, they do.

Q Would you identify for us the nature of the difficulties and problems that have been encountered in guarding against claims not in accordance with company

policy?

MR. JULIEN: I object to that question.

THE COURT: Overruled.

A In guarding against these claims, we try to identify those dealers who are submitting significant excessive claims, or erroneous claims. We do this because we receive some 6,000 claims a month, and it costs us something over $2,000 to audit a dealer, so we have to try to identify those dealers where there are significant indications or indications of significant erroneous claims being submitted.

As I indicated before, we did this by relating over a period of time, generally for a six month period, the claims submitted by dealers as compared with the incentives on the parts that they had purchased from us during the same period.

Now, this had several difficulties. I guess the largest was that we had no information regarding the changes of inventory of the dealer between the beginning of the period and theerd of the period. We did have data from the dealer regarding his total inventory levels at these two points of time, but his inventories of incentive-bearing parts could change in the opposite direction from the changes in his total inventory levels in these two

periods, and this would throw any ratios that we were trying to make entirely out of balance.

The other problem that we ran into, in trying to apply these tests, was that the test assumed that all of the incentive-bearing parts that the dealer purchased were used or were sold to eligible customers. It didn't recognize that one dealer may be selling practically all of his sales to eligible customers, another dealer may be selling none of his sales to eligible customers.

So when we applied the tests, the first dealer would look bad, the second dealer would look good, and yet, we had a problem because of the change in inventory and the assumptions that all sales of incentive-bearing parts were made to eligible people.

Q What other problems and difficulties did you encounter?

A Well, one of the problems that we were having was minimized by a change in policy that was made in March of 1970. Formerly, parts purchased from another Ford dealer who had purchased them from the Ford Motor Company were eligible parts for claiming wholesale incentive.

The problem that we ran into here was that in

auditing a dealer who was claiming incentives on parts that he had purchased from another Ford dealer, the auditor might suspect that these parts had not been purchased by the selling dealer from Ford because of the low prices at which they had been sold to the claiming dealer.

But we had no way of proving this without auditing the selling dealer in determining from whom he had bought these parts. It was a difficult problem to us, and the change in policy helped eliminate the problems we were running into in that area.

THE COURT: What change of policy was that?

THE WITNESS: This was the change that eliminated the parts purchased from other Ford dealers who bought them from Ford Motor Company from eligible -- for claiming wholesale incentives. The parts had to be -- after March of '70, the parts had to be purchased directly from Ford.

THE COURT: Was there any -- after March '70, was there any problem on that score, any significant problem?

THE WITNESS: Not that I am aware of.

THE COURT: And do I understand that the problem that you were talking about just now was the problem which would arise if one Ford dealer sold to another Ford dealer; right?

THE WITNESS: Yes. Yes, sir.

THE COURT: And the problem arose because of what, the second Ford dealer might want to get an incentive allowance?

THE WITNESS: The second Ford dealer might claim an incentive allowance on that part.

THE COURT: And obviously, he hadn't bought it from Ford, right?

THE WITNESS: That's right, sir.

THE COURT: And the incentive allowance that the first dealer got might well have been passed along to that second Ford dealer in a low price, right?

THE WITNESS: It may have, yes, sir.

THE COURT: But all in all Ford wasn't interested in giving wholesale incentive discounts to people who didn't buy the parts from Ford, right?

THE WITNESS: That is true.

THE COURT: When we started the examination of this witness, I was discussing this very point, and Mr. Julien was discussing this very point, and I said that out of all the possible problems I didn't see that this problem would be one if Ford did its recordkeeping properly, tnat is, the possibility of having a Ford dealer who had purchased from a Ford dealer make a claim for an incentive

allowance. I said I didn't see how that could be a problem if the recordkeeping were done properly.

Mr. MacCrate said the witness will tell us about a problem in that line. The witness has told us about a problem but says it was all over with as of March '70.

MR. MAC CRATE: One of the steps taken to tighten the procedure was directed to --

MR. JULIEN: Just a minute, if there is going to be a narrative statement now in the presence of this witness --

THE COURT: I want to hear Mr. MacCrate.

MR. JULIEN: In the presence of this witness?

THE COURT: Sure.

MR. MAC CRATE: Was directed to the problem of the second dealer claiming incentive for a part that had not been purchased through Ford.

THE COURT: He said it was over with after March '70.

MR. MAC CRATE: And a change was made in March of 1970. It is one of the series of changes that was made, the first one in this line, in order to tighten the procedure. Now, the problem that I was alluding to earlier was not this problem of policing sales between dealers where the second dealer falls with other than Ford but the problem to which I refer is where he falls between the two and the special problem that relates to that. That is, your Honor, a separate problem from this one.

THE COURT: We are well down the line, but I thought we were having order forms introduced and so forth, dealing with the question of whether -- wait a minute, we are still talking about the second Ford dealer claiming allowance.

MR. MAC CRATE: Yes, your Honor.

THE COURT: And you are talking about a problem that continued, namely, where the second Ford dealer buys from an intermediary. Was that a problem?

THE WITNESS: Yes, sir.

THE COURT: Did it get solved by this change in your recordkeeping?

THE WITNESS: No, I don't believe it has.

THE COURT: Why not?

THE WITNESS: Because under the WINS system that we have, we still don't have an identification by the dealer of the customer to whom he is selling parts, nor do we know when we measure the parts that he purchased from us against the claims that he is making against us, we don't know whether he is using all of those incentives bearing parts for eligible sales.

THE COURT: Your problem is to find out whether the Ford dealer has bought the part from Ford or bought it from somebody else?

THE WITNESS: Yes, sir.

THE COURT: If he hasn't yet bought it from Ford, he obviously doesn't deserve a discount from you, does he?

THE WITNESS: No, he doesn't.

THE COURT: Isn't it possible for Ford to determine whether or not Ford has sold the parts to the dealer when the dealer claims a discount on those parts? Isn't that possible?

THE WITNESS: No, sir, it is not.

THE COURT: Why not?

THE WITNESS: Because the dealer can buy the same part from the many sources. They can buy Autolite motor parts, for example, from the wholesale distributor chain, independent chain.

THE COURT: Crash parts?

THE WITNESS: He can buy crash parts from another Ford dealer who acquired them through an intermediary or an independent account, cross selling.

THE COURT: The fellow who makes a claim for a wholesale incentive allowance on a crash part, he has sold to a body shop, he is only entitled to get that allowance if he has bought it from Ford, right?

THE WITNESS: Yes, sir.

THE COURT: Are you saying to me you have no means of compelling him to identify by invoice number or some other way the fact that he has bought that part from Ford?

THE WITNESS: No, sir. I think that would be an almost impossible task because these parts generally, when they buy them from Ford, are put into a dealer inventory and they may stay in that inventory for varying periods of times and in the time he uses

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it, it would be very difficult for a dealer to identify that particular part he is using with a purchase from us.

THE COURT: Couldn't it be stamped?

THE WITNESS: I suppose it could, but I think it would be very difficult for a dealer.

THE COURT: Have you thought about it?

THE WITNESS: No, sir, we have not considered the subject of identifying each part in a dealer inventory with an invoice number that he used in purchasing the part. I think that would be tremendous workload for our dealers. There are many of our dealers who are not that active in submitting wholesale incentive claims and we would force the same kinds of recordkeeping on them that we would force on the other dealers. I think it would be a monumental workload for them to do.

THE COURT: Are you saying now you have no way at all of determining exactly where the Ford dealer buys his parts when he claims wholesale expenses on those parts?

THE WITNESS: Without a field audit, we cannot determine it. We can determine the level of purchases the dealer makes from us of various product lines, not individual parts but product lines.

THE COURT: YOu can compare the level of purchases with the level of discounts requested?

THE WITNESS: Yes, and we do that.

THE COURT: When you made the audit, what was the extent of the problem? Can you describe it in terms of dollars? How was the dollar volume of excess versus proper? Did you calculate that?

THE WITNESS: No, I did not.

THE COURT: Do you have any memory of that? Did it turn out to be a very significant problem, a little problem or something in between?

THE WITNESS: I don't believe I compared the percentage or erroneous claims with the total amounts claimed.

THE COURT: You have 37 companies you audited.

THE WITNESS: Yes, sir.

THE COURT: And you had figures as to the dollar volume of the wholesale incentives they were requesting during the audit period?

THE WITNESS: Yes, sir.

THE COURT: It would seem to me you would be interested in finding out is this a significant dollar problem or not a significant dollar problem.

THE WITNESS: We looked at that from the

amount of the disallowances this resulted in.

THE COURT: How many dollars were disallowed?

THE WITNESS: The schedule that was put into evidence shows that.

THE COURT: In dollar terms?

THE WITNESS: Yes, sir.

THE COURT: That is what?

MR. JULIEN: Exhibit S, your Honor.

THE WITNESS: I would have to add the bottom line. It looks like -- I believe the total is $83,000.

THE COURT: And you are adding what?

THE WITNESS: The third column from the right, sir.

THE COURT: That is dollar amount?

THE WITNESS: That's dollar.

THE COURT: How did that compare --

THE WITNESS: With the total claims submitted?

THE COURT: Yes.

THE WITNESS: I don't know, sir.

THE COURT: Have you done another audit subsequent to this?

THE WITNESS: We have conducted many audits. Not a group of dealers like this, specifically.

THE COURT: Have you found the problem

increasing or decreasing or what?

THE WITNESS: The amount of erroneous claims has increased since we have been working with the WINS system. I believe this is because we have been able to identify better the areas in which these outside purchases have occurred.

THE COURT: What are the areas where the outside purchases have occurred?

THE WITNESS: By area, I mean the product lines which a dealer is purchasing or claiming more than he has purchased from us.

THE COURT: What kind of product lines are those?

THE WITNESS: There are a hundred different product lines.

THE COURT: You said you would be able to identify the product lines where the invalid purchases occur most frequently. Didn't you say that?

THE WITNESS: No, sir, I didn't mean to give that impression. What I meant was, we were able to -- the auditors were able to determine better the amount of erroneous claims because they had the information broken down by product line. I do not know, I don't know of an analysis we have made to show which of these

product lines the most erroneous claims are occurring.

THE COURT: Do you have any information about what is the source and who they are buying from when they make the invalid claims?

THE WITNESS: The auditor has in each audit, but I am not aware of it, no, sir.

THE COURT: You have no information about that at all?

THE WITNESS: I do not have any.

THE COURT: You can't tell me whether it relates to purchases from other Ford dealers or purchases from independent, so-called jobbers? You have no information about that?

THE WITNESS: No specific information, your Honor, no.

THE COURT: I get your point, Mr. MacCrate. You are almost taking a legistlative approach. You feel Ford Motor Company has a right to make rules and regulations of general application. But, the point is we do have crash parts here and we are not talking really about Autolite or Motorcraft, we have one company which was, as far as I can see, was very unique, and we can have all kinds of evidence hour after hour about control problems, changes in procedure, but if

it ends up that there was no problem except that the transactions between Ford dealers, what really does that have to do with FLM? This witness cannot tell me one thing about whether there was really a problem, after all this analysis and so forth, there was a problem about FLM or any company like FLM.

So, I just don't know where all this gets us.

BY MR. MAC CRATE:

Q Can you give to his Honor any examples of the kinds of problems that arose of which you do have some specific knowledge?

MR. JULIEN: With respect to crash parts?

MR. MAC CRATE: With respect to the claiming system.

THE COURT: Let's have the specific problems.

A One of the audits that was made in 1969, the auditor found a dealer was claiming wholesale incentive on sales that he had made to two jobbers. The auditor through further investigation found that the sales were merely paper transactions, that the jobbers were in turn selling the same amount of dollar value of parts back to the dealer. These were really paper transactions, no parts moved between the two organizations and it was merely a ploy to allow the dealer to claim

wholesale incentive.

We found another audit, at the same time, a case where principal of dealer A, was a part owner of a jobber and dealer A purchased a substantial quantity of Autolite-Motorcraft from the jobber and resold them to Dealer B. Dealer B in turn sold these and claimed the incentive on them to an independent company, most of whose sales were to other Ford dealers.

THE COURT: Dealer A sells to Dealer B, and Dealer B does what?

THE WITNESS: He sells to an independent company, an expediter, most of whose sales were to other Ford dealers.

THE COURT: What is an expediter?

THE WITNESS: I'm not too familiar with the term, but generally it's someone that buys and resells automotive parts.

THE COURT: You found both of those instances in your 1969 audit?

THE WITNESS: Yes, sir.

THE COURT: Go ahead, Mr. MacCrate.

BY MR. MAC CRATE:

Q Do you have other specific examples that you can provide, Mr. Beers?

A Well, another audit in that period, we found --

MR. JULIEN: I have to take the objection that none of these relate to my client, if your Honor pleases.

THE COURT: I will overrule that. I know they don't.

A We found where another dealer was selling a fleet and the fleet had the same address as a jobber. We found in auditing this dealer that he was buying parts similar to those that he was selling to the fleet, was buying them back from the jobber at anywhere from ten to 23% off.

THE COURT: The dealer sells to the fleet and then what happens?

THE WITNESS: Then the dealer buys back from a jobber located at the same address as the fleet at a discount of 10 to 23% off.

Q Could any one of these problems be ascertained as existing in the records that you had in field accounting at the headquarters in Levonia?

A No, they could not. They were particularly difficult to ascertain because we have no right to audit a customer or the dealer and without examining the books we cannot tell where the parts are being sold.

And, these cases that I have talked about, we just happened to be auditing a dealer that was buying the parts back so we found out about it, but in many cases we would have no idea to whom the parts were being sold.

Q There are two problems here. One is identifying where to look and the other is then looking by way of an audit?

A Yes, sir, that's right.

Q With respect to the problems that you have at the second step of auditing, you have referred to access to records. To what records do you have access for auditing purposes?

A We have access to the dealers' records.

Q You have indicated that the change to the WINS form was effective January 1, 1972. Was that on an optional or mandatory basis?

A At that time it was on an optional basis.

Q Was it subsequently made mandatory?

A Yes, in June of 1974.

Q I show you Defendant's Exhibit L-1, and ask you if that is a sample page from the WINS form of claim?

A Yes, it is.

Q Would you summarize the advantages from a controller point of view of the WINS form over the prior form that we have identified as 2715 and 2715A?

A The advantages of the WINS claiming system is that we can get information on dealers' claims, by a breakdown of a hundred different product lines, and we have the purchases of the same dealer broken down by these same hundred product lines so that we can make comparisons between purchases and claims over an expended period of time to determine which dealers and in what areas they appear to be claiming more than they are buying from us.

As I indicated, because we are not aware of changes in inventory levels of any of these product lines, the analysis that we made may be imperfect because inventory changes can change but looks like erroneous claims to be perfectly eligible claims.

The other factor that we have a problem is, that we do not know the use to which a dealer puts those parts. If he claims incentive on 10% of his parts but actually sells none of them to an eligible customer, he would look like a very good bet to us, it would look like he is doing a good job and not overclaiming.

Q This is on the basis of the information

available to you in Lavonia?

A Yes, sir. On the other hand, the dealer that is doing 75% of his business to wholesale customers who are eligible for claiming wholesale incentive, appears to us he is overclaiming because of the relationship of his claims with those of other dealers.

So, this is one of our difficulties and the other, of course, is that we do not have information regarding these eligibde customers that the dealer is selling to.

Q Mr. Beers, do you remember accounting records maintained in the Fords Parts Division indicate whether a franchise dealer is operating under the dealer development program or not?

A No, they do not.

THE COURT: You had this change of policy July 1, 1971, right?

THE WITNESS: Yes, sir.

THE COURT: Have you conducted some audits since then?

THE WITNESS: Yes, we have.

THE COURT: Have you found some frauds since then?

THE WITNESS: Yes.

THE COURT: In other words, even under the new policy you might have some claims that a sale was made to a body shop when it was really made to a phony?

THE WITNESS: Yes, sir.

THE COURT: Just under some fraudulent setup of the kind you described?

THE WITNESS: Yes, sir.

THE COURT: And you found such instances, right?

THE WITNESS: Yes, sir. We found other instances, sir. If a dealer is buying a particular part from Ford and making other purchases of that part from an independent account, a jobber, let's say, we have found instances where the dealer has a difficult time keeping his records straight as to which parts he bought from Ford and which parts he bought from the independent, and he may be submitting erroneous claims on the sale of that part, he may be claiming more sales than he bought from us, simply because his records are not that accurate and he can't keep track of it. There are many other claims where, you know, a dealer may be just claiming erroneously for some other reason.

THE COURT: Are you talking about before the change of policy?

THE WITNESS: This is after. This is today.

THE COURT: He buys from an independent?

THE WITNESS: Yes, sir.

THE COURT: In other words, let's say he buys a Motorcraft which he can't get from an independent.

THE WITNESS: Yes, sir.

THE COURT: And he has a hard time, you say, keeping track?

THE WITNESS: Some dealers do, yes, sir.

BY MR. MAC CRATE:

Q You have indicated, Mr. Beers, that the cost of an individual audit is approximately $2,000.

MR. JULIEN: I didn't hear that testimony.

THE COURT: Yes, he said that.

Q How many days does it take for a normal audit?

A Well, it generally takes at least a week. Sometimes they run into two weeks.

Q How many audits do you intend to conduct in a normal year?

A It varies, I would say, between 150 to 200.

Q That is the total franchise dealers of approximately 6,800?

A Yes, sir.

Q Viewed from the point of view of your overall

responsibilities, how has the change in policy with respect to the wholesale incentive in July 1971 affected you?

MR. JULIEN: I object to that.

THE COURT: Overruled.

A It has affected my responsiblities in that it makes easier field audits to determine dealers who are submitting erroneous claims on such sales and to identify these claims that formerly were being claimed on sales to indepehdents who then ended up, parts ended up in another Ford dealer. We can not, in the course of an audit, disallow these claims at the source of the dealer we are auditing. Formerly, we didn't know where the parts were going after they got to the independent customer.

Q Mr. Beers, I showyou Defendants' Exhibit C for identification and ask you if that is a publication of Ford Marketing Corporation?

A Yes, it is.

Q What division or section of Ford Marketing Corporation is responsible for its publication?

A The Dealer Development Activity.

Q And who is the manger of Dealer Development?

A I believe it is Mr. Ramsey.

MR. MacCRATE: Your Honor, I would like to offer this publication in evidence at this time. It is on a small collateral issue that was raised with respect to who are dealer development franchises.

This little booklet describes the program and simply adds that information to this record.

MR. JULIEN: It doesn't indicate who they are, and I don't see that it adds anything at all to this record. This is some invitation to invest, and I just don't see what its pertinency can possibly be here.

THE COURT: Is there any dealer development situation involved in our case?

MR. MacCRATE: There is testimony by Mr. McKee that Thomas and Parkview at least at some time were dealer development dealers, and it is simply to explain what it is.

THE COURT: I will receive it.

xxx (Defendants' Exhibit C was received in evidence.)

MR. MacCRATE: Your Honor, I have two final questions of Mr. Beers. I would respectfully request that the questions and answers be received in camera and that the transcript of this portion of testimony be separately transcribed and kept under appropriate--

THE COURT: Who will be excluded from the hearing?

MR. MacCRATE: Those who are not involved in these proceedings, your Honor.

THE COURT: Well, we can have everybody leave the courtroom.

Is there anybody in the courtroom who isn't involved in these proceedings?

MR. MacCRATE: Yes.

(Individual excused from courtroom)

MR. MacCRATE: As I requested, I would like to have this portion of the transcript separate.

MR. JULIEN: May we perhaps by talking at the bench for a moment perhaps find out what this extraordinary request is all about?

THE COURT: The reporter will mark this beginning and the end of this portion and see if we have to have it sealed.

PAGES 803-805 sealed

NOTE: Following portion of transcript sealed.

Send ORIGINAL to Judge Griesa only.

THE COURT: Do you have any more questions of this witness?

MR. MacCRATE: No, your Honor.

THE COURT: Let's take a short recess and then you may cross examine.

(Recess)

CROSS EXAMINATION

BY MR. JULIEN:

Q Sir, I just want to take one moment with respect to Exhibit C, that's that dealer development stock plan.

Is that an arrangement under which somebody becomes distributor and in the corporation form to act as a dealer--I did not mean distributor--as a dealer, the corporation is owned 20% by the operator, and 80% by Ford Marketing Corporation?

A I am not that familiar with the plan, sir.

Q Just look, so we don't have to call attention in brief. Isn't that the arrangement?

A I believethis is a sample showing an investment of $20,000 by one party and an investment of $80,000 by anothe

Q The other is Ford?

A Yes, sir.

Q And do you knowhow many dealer development corporations there were in this area, in the metropolitan

New York and New Jersey area?

A No, sir.

Q There would be such records available in Ford?

A There would be in Ford Motor Company, yes.

Q Now, I now want to come to Exhibit S.

As an accountant, isn't it customary to make a record of the period that one is employing with respect to a test period?

A As I indicated, Mr. Julien, this was for my own information.

Q Well, whosever information it may be, since it is bei supplied here for the Court's purposes, from an accounting standpoint, a statement of the test period would be important, would it not?

A Yes, it would.

Q And with respect to all of these suspect dealers who appeared on S, was the same period employed as to each, or did the period for testing vary?

A The period, as far as I know, was the same period for each dealer.

Q Well, do you know that? Is that a fact?

A I believe in some instances we may not have had a total of five months claims from each of the dealers in making the test.

Q Were there instances, for example, where you employed a year or more analysis and entered it into this list?

A In this list--I want to correct the former answer. I was referring to the test that we applied to the 450 dealers to flag possible dealers for erroneous claims. These records, it is my understand that these records cover a five-month period in each instance--January through May of 1969.

Q And when you say that is your understanding, I don't want to persist with this question, I simply want to know, do you know?

A That was the ground rules under which these audits were made.

Q Well, now, have you had an occasion to examine Exhibit 96, an audit made of Central and FLM in the year 1969?

A Yes, I have.

Q And are you aware that that audit covered both your franchise dealer, Central, and its customer, FLM?

. You are aware of that?

A I am aware that it covered franchise dealer Central.

Q Well, the record shows that it also covered and audited the books of FLM.

MR. MacCRATE: That's argumentative, your Honor. I object.

MR. JULIEN: Then I will have to present it to him and ask him . I think that's well understood about it.

THE COURT: You have something in your hand and you want to ask the witness what you already know and see if he is going to disagree with you?

MR. JULIEN: It is not an exercise at all, your Honor.

THE COURT: Okay.

MR. JULIEN: I assure you I have an objective in which the Court will be interested.

THE COURT: Let's go to it. Go ahead.

Q On Exhibit S where you come to Central LM you have listed alongside the code numbers, have you not?

A Yes, sir.

MR. JULIEN: Those code numbers,your Honor, so as to save time, include Central's code number and FLM - 13430.

THE COURT: Yes, I see that.

MR. MacCRATE: Objection, it is not FLM's code number.

THE COURT: All right.

Q I want to call your attention to the fact that this audit of FLM and Central, which is Exhibit 96, starts checking--commencing with October 1967 and extends through

Novembbr of 1969. Do you see that, sir?

A I believe it says September of 1969.

Q Yes.

A Yes.

Q Through September '69, commencing October 1967. Do you see?

A Yes.

Q Now,please look at the figure, which is on the line for Central LM for the alleged return sales and emergency sales. Do you see that figure in the column for retirn sales to be 726, for emergency sales to be 1469?

A Yes, sir.

Q Anddo you know that with respect to this audit -- just bear with me for one moment, sir -- and do you know in that audit that the same figures, 726.41 is given for return sales, and sales to dealers,$1,458,omitting the cents?

A Yes, sir.

Q What do you call a clean audit, sir, of one of your dealers?

A I don't understand what you mean by "clean audit".

Q You never came across that term before?

A I don't know what you mean by it.

Q Well, do you gather -- would it be fair to gather from this that the figures entered in S on the line for Central actually represent a little less than two years of auditing of their books, from October '67 to September of '69?

A The auditors were to audit two periods when conducting these audits. They wereto look at the period January through May -- claims submitted for sales during the period January through May of '69, and report the disallowances separately from that period from the total of the period.

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Q Now I want to go to -- excuse me, have you finished?

A Since the figures are posted here for the test period are also those shown in the audit for the total period, I do not understand why -- what has happened. Maybe they only audited the test period and didn't go all the way or maybe they did not report the test period separately in this instance.

MR. JULIEN: The audit report shows they went right to September '69 in arriving at thos figures. I point that out to your Honor when we finally get around to briefing this matter.

Q In Exhibit S, you were listing not only disallowances for crash parts, but disallowances for Autolite, and Motorcraft items, right?

A Yes, that's right.

Q Do you have any kind of study at all which just lists what you determined with respect to crash parts of these alleged thirty odd suspects whom you audited?

A No, I do not have such a study.

Q For example, those columns which are headed "Shop Sales" would be most likely to include the Autolite and the other brand of items; is that correct?

A No. That column would include parts used in their body shop which could be crash parts.

Q But you don't know?

A No, sir, I do not know.

Q And one of the things that you said your inquiry was addressed to was to see whether claims were being made with respect to sales to insurance companies, is that right?

A I don't recall saying that but we certainly examined that, yes.

Q Because that would be an ineligible customer.

A Yes, it would.

Q And do you recall this entire audit failed to disclose single such transaction?

A No, I indicated I thought the primary reason for the ineligible customers in shop sales were sales to insurance companies.

Q You recognize, and I don't want to belabor this, you recognize that the column headed: "Insurance Claims" on Exhibit S has no entry of a single item?

A Yes, I do.

Q With respect to items such as the non-crash parts, there were wholesalers in the field in your line of the distribution, right?

A I'm sorry, I didn't understand the question.

Q With respect to items other than crash parts, such as Autolite and Motorcraft, there were wholesalers and jobbers in your line of distribution?

A Yes, sir.

Q So the danger, if there was a danger, of an intermediary in these non-crash parts was far greater than any crash part items, true?

A I don't know, sir.

Q Do you know there were no equal number of wholesalers in the crash parts, Ford crash parts at that time. You know that, don't you?

A I don't know the number of wholesalers handling crash parts.

Q With respect to such of your dealers who make fraudulent claims against you, that is, a franchise dealer who makes a fraudulent claim against you, not only are you able to audit when you desire to do so, but you can inflict some type of punitive measures such as the cancellation of a franchise, can you not?

A I believe that that is one of the points on which a franchise can be --

Q In such an instance, what has happened, one or more of your own franchise dealers may be breaching

their agreement with you, true?

A I don't understand the point.

Q In their agreement with you, they agree not to sell to other dealers and make wholesale claims against you for allowances, isn't that right?

A Not in the agreement, no.

Q But that is your policy?

A Yes, sir.

Q Even now, having changed your policy in July of 1971, respecting the wholesale incentive allowance, do you remember audits from time to time revealed that your own dealers are still participating in some kind of fraudulent arrangement, one with the other?

A The audits reveal they are submitting erroneous claims, yes, sir.

Q And these are your own dealers, right?

A They're franchised dealers, yes, sir.

Q And that is so since July of 1971, correct?

A Yes, it is.

Q And of course, one of the things -- what is that inventory group you have?

A Incentive control and analysis.

Q That is one of the things that they are organized for, both to see unusual transactions and

if they raise the red flag, to induce an audit to be made of that particular franchise dealer, right?

A They try to identify those dealers submitting significant erroneous claims.

2pm Q And as an accountant, when an audit is performed, you can check the purchases and you can check the sales of the books of your dealer, right?

A Yes, sir.

Q Of this total of $84,000 that you told his Honor, approximately, represents the transactions disallowed in Exhibit S, do you have any way of knowing how much of that was in the crash part field?

A No, I don't.

Q And this new WINS system that you have inaugerated, since its establishment, has the work of your inventory control unit been improved in some fashion?

A I don't understand what you mean by improved.

Q Are there things now available to them which theretofore had not been available to them?

A Yes.

Q And those things include an assessment of the purchases made by your franchised dealers by categories, is that right?

A By product lines, yes, sir.

Q Making it easier for your control unit to raise a red flag with respect to any dealer who is showing more claims in a category than purchases over a period, is that right?

A Yes, but I pointed out that this was not of a positive control.

Q Whether positive or not, it is an added factor, something that has been more beneficial and something that you did not have before.

A That is correct.

Q This estimate which you afforded his Honor's total amount of disallowed incentives, has that ever been totaled or audited in some fashion so that we could have an exact rather than a rough estimate?

A No, sir.

Q That wasn't considered important enough to conduct an audit?

A I don't know how we could conduct an audit. We would have to audit every one of our dealers.

Q It wasn't considered important enough to total up with respect to these dealers whom you considered to be the most suspect?

THE COURT: I don't know what you are getting at, Mr. Julien. They could find out the individual

dealers that they check.

MR. JULIEN: And they could also find the ratio that it would bear to the whole of the inventory allowances. That would be easy to ascertain.

THE COURT: That isn't an audit. That's something you are thinking of. Let's go ahead. I would like to ask you this: The figures you mentioned before, for five and a half years, are the sales for crash parts and parts roughly flat over this time?

THE WITNESS: I believe they have been increasing.

THE COURT: I would like to have yearly figures now.

THE WITNESS: I don't have them.

THE COURT: I would like that be submitted in some way. Then, the estimate of excess claims, the rough estimate, when was that made?

THE WITNESS: I believe it was made sometime after this test.

THE COURT: Sometime after the 1969 audit?

THE WITNESS: Yes, sir.

THE COURT: Is related to what, the year 1969?

THE WITNESS: In that period. I don't recall it that precisely, sir, but I believe it sprang from

this kind of a test.

THE COURT: Can you tell me whether the amount of excess incentive allowance has increased or decreased as the years went on, '70, '71, '72? Do you know what has happened?

THE WITNESS: Well, it depended on two things. One, the number of audits that are conducted in those years and the amount of erroneous claiming that has occurred. I think that the last year that I can recall was an increase over the previous years.

THE COURT: What was that last year?

THE WITNESS: I believe it was 1973.

THE COURT: '73?

THE WITNESS: Yes, sir.

THE COURT: Are you talking about the amount of excess found in the audits that were conducted?

THE WITNESS: Yes.

THE COURT: Or are you talking about an estimate based on --

THE WITNESS: No, these were the amounts that were disallowed when the audits were conducted.

THE COURT: Did you conduct more than 37 audits? About how many audits did you conduct?

THE WITNESS: I'm not sure. I believe it was

in the neighborhood of 160 to 175.

THE COURT: So you had more audits than the 37 you did back in '69?

THE WITNESS: Yes, sir.

THE COURT: And you found more. What was the total excess found in the 175 audits in '73?

THE WITNESS: As I recall, it was something over $400,000. I can't be that precise.

THE COURT: Out of 175 accounts?

THE WITNESS: Approximately.

THE COURT: Was there any attempt made to estimate the total annual excess claims in any years after the '69 time we talked about?

THE WITNESS: Not that I can recall, sir.

MR. MAC CRATE: Your Honor, may I request that in your initial question to the witness the dollar amount be excised from the record?

THE COURT: There is no indication on that.

MR. MAC CRATE: From the point of view of protecting that figure, which is all that I am interested in protecting, I would appreciate if the question could appear without the dollar amount. I think it is clear what your Honor --

THE COURT: We will see about that.

Q In these additional audits that you just told the Court about, in those audits, too, with respect to the disallowances, there was no breakdown between disallowances on crash part items and disallowances on the other items, the Autolite and Motorcraft?

A No, sir.

Q "By "No, sir", do you mean there wasn't a breakdown?

A There was no breakdown between the crash items and the other items.

Q And you have no way of telling us what percentage, for example, of disallowances of crash parts would bear to the entire total of 400,000 that you mentioned?

A No, I do not.

Q You told his Honor, you gave him an incident of an audit which revealed that there were two jobbers dealing with each other through some paper transaction where the dealer was making a purchase and had set up some jobber with a paper transaction. Do you have the name of that concern?

A It was not one of those audits. It was an earlier audit, earlier than 1969.

Q It does not appear on Exhibit S?

A No, sir.

Q Do you have a record of that?

A There is an audit report available, yes, sir.

Q You don't have it here?

A There is one in the courtroom, I believe.

MR. JULIEN: May I call for it, your Honor?

THE COURT: Yes.

MR. MAC CRATE: Mr. Beers, can you identify which of the audits it is?

THE WITNESS: Wabash Ford Truck Sales. I have a copy in my briefcase. May I --

THE COURT: Certainly. Are you going to ask about all three of these instances? Should he get all three reports, Mr. Julien?

MR. JULIEN: I think that would be helpful.

THE COURT: All right, let's get all three reports.

BY MR. JULIEN:

Q Are these the three examples which you furnished his Honor with during the course of your direct examination?

A Yes. There are four audits here. These two are two audits made of the one example.

Q Is this on the same subject?

A This is the third.

Q Let me take Wabash first. Wabash was one of your franchise dealers in Indianapolis, is that correct?

A Yes, sir.

Q And the fictitious arrangement that you found your own dealer had been involved in had nothing to do with crash parts, did it?

A I am not sure what kind of parts are involved.

Q Weren't they Autolite branded parts?

A That's what it says, yes, sir.

Q And Auto--

A Wait a minute, let me see that again. It says the dealerships had been purchasing Autolite branded parts from these jobbers but he was not claiming on those parts. He was claiming on the parts that he sold to them.

THE COURT: What kind of parts?

THE WITNESS: I'm not that familiar with that detail, sir.

THE COURT: When was this incident?

THE WITNESS: This was in March of 1969 and it does say he was selling Autolite parts to these jobbers and claiming incentives on them.

Q I am just going through this rapidly. One of the other examples that you afforded his Honor, did that refer to the Moore Ford Company?

A Yes, sir.

Q At one of your dealers?

A Yes, sir.

THE COURT: Where was that?

THE WITNESS: October 1969, North Little Rock, Arkansas.

Q In this case, once again, the transactions that were dealt with had to do with Autolite branded sparkplugs, filters, and electrical parts from outside sources, correct?

A Yes, sir.

Q These parts that are called multiple source parts, right, manufactured by others than Ford Company as well as Ford?

A Those are parts we sell through both channels of distribution.

Q And manufactured by others than just Ford?

A Not necessarily.

Q I didn't say necessarily. I say in addition to Ford, they are manufactured by others, right?

A They may be.

THE COURT: Weren't they instances where these people were buying from Ford and then engaging in some kind of transaction to get the parts back?

THE WITNESS: That's the next --

THE COURT: Wait a minute. The Wabash situation was the one where the dealer sold to a jobber who sold back again.

THE WITNESS: Just a paper transaction.

THE COURT: Had the parts originally been bought from Ford before there was this paper transaction?

THE WITNESS: I assume so, yes.

THE COURT: The second transaction where Dealer A sells to Dealer B, who sells to an expediter and so forth, were the parts originally bought from Ford?

THE WITNESS: Yes, sir.

MR. JULIEN: With respect to Wabash, if your Honor pleases, there is nothing in the audit that says it was bought from Ford. On the contrary, the indication is he was buying from a dealer. Perhaps we better have it in evidence.

THE COURT: Whatever you want.

MR. JULIEN: I will offer in evidence the report of examination of Wabash Ford Trucks.

THE COURT: Let's get it marked for identifi-

cation.

MR. JULIEN: Yes, your Honor.

[Plaintiff's Exhibit 114 marked for identification.]

THE COURT: There was another Wabash document?

MR. JULIEN: No,your Honor. The next one is Moore Ford.

[Plaintiff's Exhibit 115 marked for identification.]

MR. JULIEN: And now the next is Charlie Hillard Ford, Fort Worth, Texas, dated October '69, and may that be marked.

[Plaintiff's Exhibit 116 marked for identification.]

THE COURT: Do you offer those?

MR. JULIEN: Yes, I do.

MR. MAC CRATE: No objection, your Honor.

THE COURT: Received.

[Plaintiff's Exhibits 114, 115 and 116 received in evidence.]

THE COURT: We will take a half hour recess and finish this case today.

MR. JULIEN: Your Honor, I have an appointment which requires me to leave by 4:30.

THE COURT: I have to finish it today.

MR. JULIEN: It's a television program in which I am appearing, your Honor. It is going to be taped.

THE COURT: I really can't help it.

MR. MAC CRATE: I respectfully request again to protect the confidentiality of that figure, that it not be transcribed.

THE COURT: All right.

[Recess.]

[Adjourned to October 9, 1974 at 3:30 p.m.]

* * *

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Name	Direct	Cross	Redirect	Recross
James R. Rose	671	672		
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FLM COLLISION PARTS, INC. 829

-against- 73 Civ. 713

FORD MOTOR CO. and FORD MARKETING CORPORATION

October 9, 1974
3:30 P.M.

W I L L I A M A. B E E R S, resumed.

THE COURT: All right, Mr. MacCrate.

MR. MAC CRATE: Your Honor, as I have advised Mr. Julien, it came to the attention of counsel last evening that we had made a mistake in the reproduction of a document that has been marked in evidence and what has happened, the last columns of the document are not on the exhibit in evidence.

It is Exhibit S, your Honor.

I have given to Mr. Julien the complete copy, and I would like leave at this time to substitute the corrected copy.

THE COURT: Okay. Let me see it.

(Document handed to the Court)

THE COURT: We have here the original schedule from which the reproduction was made.

Well, what does this add?

MR. MAC CRATE: Well, it adds the columns that were inadvertently omitted by us, by counsel, when we

reproduced the document, and we had no realization of that until last evening.

THE COURT: Well, I just don't understand the exhibit now. In the first part we had yesterday, there are two categories, shop sales and wholesale sales, and then we have got some other columns which have the heading total audit and there is a repetition of the two categories for shop sales, wholesale sales.

Can you explain what the columns mean now?

THE WITNESS: Yes, your Honor.

MR. JULIEN: Perhaps if you had the earlier, original Exhibit S before you that may be of some assistance to you.

THE COURT: I do.

MR. JULIEN: Very well.

THE WITNESS: The complete work sheet you have shows both the results of the audits during the test period which was January through May of '69 and the results of the complete audit.

THE COURT: What do you mean the complete audit?

THE WITNESS: Well, if the auditors found a significant disallowance during the test period in reviewing

January through May, then they were to go back and extend our audit further back to a two-year period, if necessary, in order to get the total amount of the disallowance, and that's what the columns on the right represent, the total amount of the disallowance for the total audit period.

THE COURT: And the total amount of the disallowance for these 37 accounts turned out to be $172,842 instead of $83,165.

THE WITNESS: Yes, sir.

THE COURT: But that was for in some cases a bigger period than the five month test period, right?

THE WITNESS: That is right.

THE COURT: Okay.

All right, Mr. Julien.

MR. MAC CRATE: I would suggest, your Honor, from the point of view of orderly procedure that you might wish to have us respond to the Court's questions in the course of yesterday's session directed toMr. Beers. You asked could we break down certain figures, could we produce estimates.

THE COURT: All right.

MR. MAC CRATE: I have that material, some of which we obtained from Michigan overnight.

We would respectfully request, your Honor, that these six exhibits be given in camera treatment.

THE COURT: All right, they will be marked and they will be given the same treatment that that portion of the transcript was given.

Do you have them marked for identification?

MR. MAC CRATE: Yes, CX, CY, CZ, DA, DB and DC.

MR. JULIEN: I am looking at these for the first time.

THE COURT: These are quite a group of exhibits. Do you offer them in evidence?

MR. MAC CRATE: I am prepared to offer them in evidence, your Honor. Mr. Beers can identify all of this material. If there is to be interrogation with respect to their content, I would have to ask that the courtroom be cleared.

THE COURT: I think these are pretty basic figures and I would expect to be able to refer to them in any opinion I render and I would expect to have them discussed in briefs and I would expect -- you know, I can't say what will be done in the Court of Appeals, but I would certainly think you would have to be prepared for them to be referred to in any appellate opinion, and

beyond -- I think this is getting to be a substantial inconvenience. This is a group of exhibits which to me has great importance in the case, and I just think that we ought to be able to talk about it. This is a public case. These are historical figures, generally, by and large.

MR. MAC CRATE: Well, your Honor, there is considerable precedent for the treatment that I request with respect to highly sensitive competitive data which this is.

THE COURT: I know that there is precedent, but for highly sensitive competitive information. But I don't see that this is of that category.

MR. MAC CRATE: It provides figures with respect to the business of the Ford Motor Company that is not known to its competitors so far as we know.

THE COURT: So?

MR. MAC CRATE: And it provides a kind of information as to the business of Ford that General Motors, Chrysler, the other manufacturers have not had access to and which we have done everything possible to protect against disclosing.

THE COURT: What is the sensitivity?

MR. MAC CRATE: The sensitivity relates to the

whole aspect of the costing and pricing of parts, and what we are talking here are total figures, anyone can take these component parts and interpolate up to the totals, and those total figures are highly sensitive as a competitive matter as my clients understand.

THE COURT: These are words. I hear you talking, but I don't get anything that I can understand.

The prices that Ford charges for its parts to dealers, the discounts, the amounts and percentages of discounts and the parts on which those discounts are given, and the recommended retail prices, all that information is a matter of public --

MR. MAC CRATE: No question about that.

THE COURT: -- of public circulation.

Now, here we have facts about something which --

MR. MAC CRATE: It's the total.

THE COURT: General Motors can find out and undoubtedly knows the percentage that you are granting in the way of wholesale incentive allowance.

MR. MAC CRATE: That is not of difficulty.

THE COURT: Now, General Motors would learn, if they bothered to be interested or find out what was said the other day, they would learn the figures for the

total annual incentive allowances granted on crash parts and total parts.

Now, I don't --

MR. MAC CRATE: It's at that point that we come to an area of data that so far as we know is not known to the competitors of Ford.

THE COURT: So?

MR. MAC CRATE: And it is information that would be very helpful to the competitors in their competition with Ford.

THE COURT: Why?

MR. MAC CRATE: This is a question of your whole cost and pricing and the --

THE COURT: This just gets off into thin air. Your whole cost in pricing. It seems to me that -- I haven't looked at the exhibits that are being offered today, but the figures that we dealt with yesterday did not deal with costs; they dealt with wholesale incentive allowances granted which were a percentage of the prices charged by Ford to its dealers.

Now, I don't see any way in the world for General Motors to calculate from those figures anything about Ford's costs of production. As far as the cost o- the dealer in buying from Ford they can find that out

from reading a price list.

As far as volume of parts sold by Ford toits dealers, I suppose that if that is a matter of secrecy, I guess General Motors could get a hold of these figures and make some kind of an estimate of the number of parts and crash parts which Ford is selling to its dealers.

MR. MAC CRATE: And that is the information.

THE COURT: Information which in an antitrust case in terms of total dollar volume of goods sold is present in probably, you know, almost every antitrust case ever tried, if it relates to this kind of general subject matter.

MR. MAC CRATE: Your Honor, it varies considerably from case to case with respect to the particular data where you're talking about a piece of business.

THE COURT: You told me that -- you started out, we could get the record read back -- you were talking about somebody finding out about costs.

Now, I don't understand that, I have tried to analyze it, and I find that there is nothing in this data, at least the data dealt with the other day, that would relate to costs.

Now, you tell me after my discussion that you are worried about General Motors determining volume. That's

a different subject. But all I want to know, I want to know from you, some rational ground for going to what is becoming increasingly great nuisance of holding these figures confidential.

Now, what is there? Are you worried about General Motors finding out about costs, volume, or what?

MR. MAC CRATE: It's the total figures that are currently not public information.

THE COURT: And? How will it damage Ford to have those total figures go out?

MR. MAC CRATE: Those are the total volume figures, and from that you have the entire distribution of parts that you can break out piece by piece and cost by cost.

THE COURT: Let me just have that read back.

(Record read)

THE COURT: What you have just said [illegible] does not make the slightest bit of sense to me, I have to tell you. I don't think from total volume figures you can derive the piece by piece anything. Nor can you derive anything about cost except -- that isn't known.

What kind of piece by piece and cost are you

talking about?

MR. MAC CRATE: Your Honor started with a recital of the various items of information that are known.

THE COURT: Right.

MR. MAC CRATE: I am told by my client that using those items of information and applying them to these total figures, people who are knowledgeable in this business, and I do not pretend to have the knowledge of the details of this business, that can put this into sharp focus at every point for your Honor at this time, but I am told that people who do have this knowledge, possessed of the information that is public information, and applying it to the total figures for which I am asking protection, could learn a great deal more about Ford's business than they have known before.

THE COURT: What could they learn?

MR. MAC CRATE: One of my difficulties, your Honor, is to articulate it in detail for you as you were requesting because I am given a general representation by my client and I have not had an opportunity to go into detail.

Now, Mr. Zolbert, who is with me, from the Ford legal department, may be able to expand on this.

THE COURT: Fine.

MR. ZOLBERT: One of the things, again I have to say the same thing that Mr. MacCrate did, I have to rely on what I am told by our people, none of the breakdown between the crash parts and the total parts is public. In fact, none of our part sales are public, nor are General Motors part sales public. We have total dollar volume figures, sales of cars, sales of all parts of the companies.

The figures that were testified to yesterday give the wholesale incentive claims on crash parts -- that was one figure, and then they give the wholesale incentive claims on all incentive bearing parts.

Now, those parts are competitive parts. We sell those parts both to dealers and to the independent channel.

THE COURT: Mr. Zolbert, I assume if somebody found out the amount of wholesale incentive allowances granted in total for crash parts and also for total parts they could do some kind of calculation of total volume of the different parts sold by Ford to its dealers, and I just say, so what?

And these are figures going back -- there are some fairly current figures but some figures going back

years and I don't think in an antitrust case relating to crash parts, I just don't see how Ford can really claim competitive injury by having the disclosure in the evidence in this case of that kind of figure from which total sales of the two kinds of parts could be derived.

I would almost expect, if I were Ford, to have that come out.

What is General Motors going to do with it? If they find out how well you are doing in selling your crash parts, it shows how frequently Ford's crack up, as far as I am concerned. They could probably find out without going through this shenanigans.

MR. ZOLBERT: It also shows how well we are going selling our competitive parts and selling them to the independent channels or selling them through the dealer and where we are concentrating our efforts.

It might appear that perhaps they are slipping up. Perhaps we are selling more competitive parts on a relative basis than our competitor is. That's an advantage to Ford Motor Company that we have managed to achieve.

THE COURT: Where is there in the record that shows the amount of parts being sold to the distributor?

What is there that gives them any comparative figures?

MR. ZOLBERT: They have the breakout between the crash parts and the non-crash parts, right? But what they would be able to see is the incentive parts are the parts sold to the dealers,right?

THE COURT: That's right, and that's the most they could even calculate anything about from any of the figures I have seen.

MR. ZOLBERT: And they could compare this to the sales they are making.

Now, if their figures were in here, fine. Everybody would be on even footing. But we wouldn't know what they are doing. They will be able to look at the record and determine the amount of sales that we are making to our dealers both in crash parts and competitive parts and they will be able to see how well they are doing in relation to Ford Motor Company and be either secure in the knowledge that they are doing a little better than we are or find out that perhaps they should devote more attention to sales to dealers of competitive parts, and we wouldn't be in the same position that they are.

This also applies to Chrysler as well, American Motors, any company.

THE COURT: Is there any representative of General Motors in the room?

MR. ZOLBERT: There are a couple of people here we don't know who they are.

MR. JULIEN: I own one of their cars. That's about it. General Motors.

THE COURT: I tell you I have got to be able to deal with the evidence. I have got to be able to ask questions now, discuss the evidence in oral argument, discuss it, hear about it in briefs and write an opinion and maybe say something. I am not going to have part of my opinion under seal, I will tell you right now. There is nothing I have seen that would indicate the need for that. All I am going to do, I am not going to put these things under seal but I am just going to admonish the parties present in this courtroom to use these figures, and that means any figure at all for the purpose of this litigation and this litigation only and I am issuing a direction that no information in this case be given to anyother motor car manufacturer or any representative thereof.

And we will use it for this case and if there is any indication that anybody is snooping around from the auto manufacturer, why, we will do something.

The record isn't going into the file, it is going into my office. I have got to work on an opinion, and if and when -- when the time comes when the material goes into the public file, we will see what needs to be done. I don't want to have a clumsy operation going on now, so we will try to protect what you need to get protected but there are not agents of General Motors hoovering about this room awaiting this information, and when the times comes that the case is through and what I have to do with it, and materials are sent to the public file, why, that's another matter. It probably won't go to the public file, it's probably going right up to the Court of Appeals, so there is a long road ahead.

MR. JULIEN: I have one thing to bring to your Honor's attention.

THE COURT: What's that? You will disclose it on the David Suskind Show.

MR. JULIEN: I want you to know they have warnly received your felling about the freedom of the press.

Perhaps we are dealing with something which is threshhold that we must deal with first may obviate the problems that they have because as I justlook at these papers for the first time, I am going to have to require some idea of what their contents really mean before they

are offered and then I shall have something to say about their admissibility.

THE COURT: Mr. MacCrate has just brought into Court, and that's all he even purports to do -- also you would agree to the admissibility right now, he would have to lay a foundation and I am sure he is prepared to do that.

tl Let's go ahead on that basis. Okay.

1 cmsr Beers - direct 845

W I L L I A M A . B E E R S [resumed.]

FURTHER DIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Beers, I show you Defendant's Exhibit CX marked for identification, and I ask you if you can identify for the record what that document is. [Handing.]

A This is a record by year of the wholesale incentives paid on crash parts and total parts --

MR. JULIEN: Crash parts and what parts?

THE WITNESS: And total parts.

MR. JULIEN: Thank you.

A [continuing] -- from November, 1968 through June, 1974.

Q On a year-by-year basis?

A On a year-by-year basis, yes, sir.

THE COURT: I think this is in direct response to a question of mine. I would certainly like to receive this.

All right, Exhibit CX is received.

[Defendant's Exhibit CX received in evidence.]

Q Mr. Beers, I show you Defendant's Exhibit CY and I ask you to identify that document for the record. [Handing.]

A This is a summary of the results of audits of wholesale incentive plans for each year 1968 through 1973 showing the total number of dealers audited, and the amount, total amounts disallowed in each year.

MR. MAC CRATE: This again, your Honor, is an attempt to respond to a question of the Court.

MR. JULIEN: Well, if your Honor pleases, apart from whether it was a question of The Court, at the moment I am not addressing myself to it. What I do address myself to is the fallacy of choosing, as we know from previous testimony, those dealers which were the most suspect, and taking their figures and attempting to arrive at conclusions respecting them which would attempt to pervade the entire area.

Now, obviously if we had figures which applied to all dealers, that would be something. But we know from what the witness said before on our last session that what he does is, he takes places where there is suspicion of greater sales, and then they are in the audit, and to use that base to draw any conclusion from I think would be entirely erroneous.

Do I make my point clear to you, sir?

THE COURT: Yes, you do. The thing that is of some help to me, though, Mr. Julien, is to get some

idea of the magnitude of the so-called control problem.

Now, as long as we just talk about it in general I have no way to measure it at all, and I certainly haven't thought the case through to the bitter end by any means, but it seems to me that maybe when I am trying to decide on Ford's argument about the control problem and the need for uniform rules and regulations, and so forth, I will need to have some idea of the quantity and magnitude of the control of the problem. And it would make some difference to me, to know something about the relationship between the amounts disallowed and the total amounts of the credits granted.

To be sure this is very incomplete information, and I am not saying that in any criticism of Ford, but the did not audit all 6,000 dealers, and they wouldn't be expected to audit them. But at least this gives us some information about what they did audit and what they found from that sample.

All I can say to you is to me it is better than nothing. But I certainly have in mind what it does not show as well as what it does show.

So, I will receive Exhibit CY.

[Defendant's Exhibit CY received in evidence.]

BY MR. MAC CRATE:

Q Mr. Beers, I show you Defendant's Exhibit CZ and I ask you please to identify that. [Handing.]

A These papers are --

MR. JULIEN: Mr. Beers, just a trifle louder, please.

A These pages are summaries that I prepared as a result of the test audits made in the summer, late summer and Fall of 1969.

The first sheet shows for the 37 audits that were conducted the amount of claims that were audited and the audit disallowances under the heading, "Audit Findings", and broken down into different categories.

I did this to try to estimate the effectiveness of the tests, the statistical tests that we were using at that time, to select dealers who may be submitting excessive claims.

These data were also used to make an estimate of the total amount of erroneous claims by the entire dealer body.

THE COURT: Is this something you prepared last night?

THE WITNESS: No, sir. These were prepared after the 1969 audits were conducted. I would say

probably NOvember or December of 1969.

Q They are in your handwriting, Mr. Beers, but made in 1969?

A Yes, sir. That's right.

THE COURT: I am at a little bit of a loss on this. What value does this have in the case?

THE WITNESS: You asked, your Honor, if we had made any estimates of a total amount of erroneous claims in the dealer body, and this was such an estimate that I made --

THE COURT: Oh. All right.

THE WITNESS: [continuing] -- at the conclusion of the 1969 audit.

THE COURT: Well, where is the estimate then? At the very last?

THE WITNESS: The second page, the bottom of the second page, the column on the right, the last column on the right shows the maximum estimate. That's $2,100,000. The third column from the right shows the total of the minimum estimate of $1,200,000. The last page is just a summary of the same data arranged in a different sequence.

THE COURT: Basically how did you arrive at the minimum estimate?

THE WITNESS: In the minimum --

THE COURT: This is an estimate for what period?

THE WITNESS: This is an estimate for the full year 1969, your Honor.

MR. JULIEN: Where does it say that? I beg your Honor's pardon.

THE WITNESS: And this would be an estimate of the excess --

THE COURT: Claims over the proper claims?

THE WITNESS: The erroneous wholesale incentive claims.

THE COURT: Erroneous.

THE WITNESS: Yes, sir.

THE COURT: How did you get the minimum estimate?

THE WITNESS: I first segregated dealers between what I considered large claiming dealers and small claiming dealers. The large claiming dealers were the 457 dealers that we made statistical tests on, and we arrived at the percentage of the disallowances for those dealers as a result of the audits. They are shown on the first page here. [Indicating.]

THE COURT: Where is the 457?

THE WITNESS: Well, the 457 dealers is not

shown -- they are not shown here, there were worksheets where we showed the total claims that they had submitted for the test period January through May of 1969, we showed the total purchases that they had reported, that they were making from us, that they reported on their incentive claims.

We showed the total sales that they had made at wholesale sales that they had made in their shop and other financial data that they have given us on their wholesale incentive plans.

THE COURT: On Page 1 of that exhibit it shows the 457 dealers that --

THE WITNESS: Yes, sir.

THE COURT: It doesn't say anything about any broader number of dealers, does it?

THE WITNESS: No, it does not.

THE COURT: All right. Now, what does Page 2 talk about?

THE WITNESS: Page 2 then talks about the entire dealer body. All dealers, and I merely recapped the first page in order to get estimates of the amount of disallowance that we could expect on claims dealers where the test indicated they were submitted excessive claims.

THE COURT: Now let's just take the first item, claims. What do you mean claims that exceed tests?

THE WITNESS: Well, we tested -- we took a ratio of the claims that dealers have submitted for their shop sales and compared that with their cost of parts used in the shop to get a ratio of what they were claiming, the incentive they were claiming on the shop sales.

THE COURT: Did you make that for the 457 dealers?

THE WITNESS: Yes, sir.

THE COURT: So you took a ratio of the incentives claimed as a percentage of their parts purchased, cost of parts purchased.

THE WITNESS: No, sir. It was a ratio of the percentage claimed against the cost of parts sold by them. Because incentives are claimed beyond their sales.

THE COURT: All right. I meant to say that. And what did you get, a percentage?

THE WITNESS: Yes, sir.

THE COURT: All right. Then you have --

THE WITNESS: We did the same thing for wholesale sales.

THE COURT: Right.

THE WITNESS: And then we arrived at the percentages that we thought would be reasonable, and we segregated the 457 dealers and the 37 dealers that we audited based on whether those percentages that were above our basis of reasonableness or below that.

THE COURT: Well now, look, let's just go down this page to claims that exceed tests. You mean claims that exceeded the percentage that you found in that statistical survey?

THE WITNESS: Yes, sir.

THE COURT: Then you got shop sales, and then the entry over $240,000 claimed --

THE WITNESS: This was --

THE COURT: Just in dollar amount?

THE WITNESS: Well, these were the large claiming dealers. These were dealers that had claimed over $2,000 a month during our test period. And we extrapolated out of the 450 dealers, we knew that these would be the dealers that were in that category. And the only dealers in that category. All we did was to extrapolate five months claims to a full year. And we applied.

THE COURT: You found 95 of them in that

category?

THE WITNESS: Yes, sir.

THE COURT: And the incentives claims totaled 967,000?

THE WITNESS: That's what we estimated, yes, sir.

THE COURT: Well, didn't you know the estimate the incentives claimed?

THE WITNESS: No, sir. This was done before the end of 1969.

THE COURT: But you used the test period, but you knew for the test period.

THE WITNESS: Yes, sir.

THE COURT: Was it 967 or 962?

THE WITNESS: 967.

THE COURT: All right. Then you have a percentage over there, what is the percentage?

THE WITNESS: The percentage is shown on the first sheet. That is what we found. The disallowances. There was a ratio of the claims that fell into that category during this test period January through May.

THE COURT: You mean 29% disallowance.

THE WITNESS: Yes, sir.

THE COURT: The next line is under 24,000 claimed, and you have got 1,200 in that category total

incentives claimed at least, your estimate is 732,000, you are using a 15% figure under the minimum estimate. Where do you get that?

THE WITNESS: Well, you notice in the estimate I used the same percentage as for the dealers, the large claiming dealers, over 24,000. I made in the minimum estimate I assumed first that only half as many claims would exceed the test as the maximum projection. To try to be conservative, your Honor. And then I also further assumed that there would only be approximately half of these erroneous claims that we found in the tests. And that's the difference between the maximum estimate and the minimum estimate.

I just tried to be more conservative in the minimum estimate than I was in the maximum.

THE COURT: Well, your 29.3 came from actual experience with 13 dealers; is that right?

THE WITNESS: Yes, sir.

MR. JULIEN: Did you say 13, your Honor?

THE COURT: Yes.

If you will look on Page 1, it wasn't 37 dealers, it was 13 dealers.

MR. JULIEN: I see. Yes.

THE COURT: Shop sale claims that exceeded the

statistical test.

MR. JULIEN: I see it.

THE COURT: So you had 13 dealers that had an average of 29.3% erroneous claims.

THE WITNESS: Yes, sir.

THE COURT: Now what I want to know is how you can possibly make any kind of an estimate of 29% or 15% or any kind of per cent as to anybody else. Twelve hundred dealers, four thousand dealers or what dealers.

THE WITNESS: Well, that is why I used a minimum estimate for those dealers that we had no data on.

THE COURT: You say minimum, 15% sounds high to me. What is your basis for saying 15% is the minimum?

THE WITNESS: Well, I assumed that they would be claiming that half the amount of their claim would exceed the test and you see I'm using $700,000 instead of a million four, it's in the maximum column. And I'm also just cutting the rate of disallowed claims in half. It's an arbitrary assumption, your Honor.

THE COURT: In other words, you are using less than the -- wait a minute now. For the minimum estimate the 732,000, is that half of the extrapolation

based on the actual test period figure?

THE WITNESS: Yes, sir. Let me explain that. We know the claims submitted by the 457 dealers during the test period and the 1,464,000 is based on the remainder of the claims submitted during that test period. That must have been submitted by the other dealers that were not in the test.

THE COURT: Well, I think I get your basic method. Now, in other words, you reduced the dollar amount of the claims by half and you reduced the percentage by half to get the minimum percentage.

THE WITNESS: Yes, sir. And I did the same in each of the other categories here.

MR. JULIEN: I will want to be heard on this, your Honor.

THE COURT: All right. Do you offer this exhibit?

MR. MAC CRATE: I do, your Honor.

THE COURT: All right, Mr. Julien?

MR. JULIEN: I object to it, if your Honor pleases. I think that the person who prepared this has himself said that he has made certain arbitrary assumptions, and on the basis of those arbitrary assumptions he extrapolates figures which necessarily

have a sandy base. In addition to which, if I understood, and I am not sure I did, but if I understood it once again appears to me that some of the experiences which he gained in the specialized audit report he was using again for those figures, which again he made arbitrary assumptions on. And I say once again to take the top suspect dealers and take any figures and then pile onto that arbitrary assumptions certainly is going to give us an exhibit which is worth no value whatever, and, indeed, may well be misleading.

MR.MAC CRATE: Your HOnor, I suggest that the purpose for which it is offered is to show what Ford was doing, and this is the man who was making the estimate. He has explained what he did. If there is an objection as to the quality of his estimate it does not go to the merits of the fact that an estimate was made. There was an attempt, this was the attempt.

THE COURT: I agree with that. I will receive it. I think that the degree of arbitrariness in selecting certain percentages and figures is brought out in the record, and I don't think we are going to be misled by that. I think I understand it.

All right, I will receive it. That is Exhibit CZ.

[Defendant's Exhibit CZ received in evidence.

BY MR. MAC CRATE:

Q Mr. Beers, I show you a copy of Defendant's Exhibit DA marked for identification. [Handing.] Would you please identify that?

A This is a schedule prepared by the marketing office of the Ford Parts Division to estimate the ineligible claims due to outside purchases. These data are the results of a study of 20 dealers in the Cincinnati district to try to understand the effect of our new WINS claiming system.

Now, this study was made in the summer of 1971. I don't know the exact date, but this is a schedule that was put forth from that particular study.

THE COURT: It relates to the fourth quarter of 1970; is that right?

THE WITNESS: Yes, sir.

THE COURT: Was that before the WINS system was put in ?

THE WITNESS: Yes, sir, it was.

THE COURT: How does it bear on the effectiveness of the WINS System? Did you have another study after the WINS system came into --

THE WITNESS: No, sir, we did not.

THE COURT: How does it bear on the effectiveness of the WINS system?

THE WITNESS: Four personnel visited these 20 dealers and recapped their claims on the WINS claim form, or, a simulated WINS claim form. In other words, they showed the quantity of each part that the dealer had claimed in the fourth quarter of 1970. They compared these claims by various product lines with purchases, average purchases that these same dealers had made from us in earlier quarters to attempt to identify excessive claims by product line. And these numbers on here are the amounts of the excessive claims that they identified in that fashion for these particular dealers.

The percentage at the bottom --

THE COURT: What does this mean, "Outside purchases"?

THE WITNESS: It means that they claimed more parts than they bought from us. So they assumed they were claiming on outside purchases.

THE COURT: These all relate to non-crash parts; is that right?

THE WITNESS: No, sir. There is no breakdown

here between whether they are crash parts or non-crash parts. Obviously the plugs, the shocks, the filters, board electrical are, but I don't know what is in miscellaneous. That could be all other parts that fell into those categories.

THE COURT: These dealers were located where?

THE WITNESS: In the Cincinnati district.

THE COURT: All right. Now as far as the non-crash parts there was a bona fide outside source, there were bona fide jobber wholesalers, weren't there?

THE WITNESS: Yes, there were.

THE COURT: And as far as crash parts, the only source in, what was it, Cincinnati?

THE WITNESS: Cincinnati.

THE COURT: The Cincinnati area would be other Ford dealers, wouldn't it?

THE WITNESS: I don't know, your Honor.

THE COURT: Well, I think the record would show that there is no indication that there was an outside jobber wholesaler or distributor or anybody like that in the Cincinnati area for crash parts.

THE WITNESS: I just don't know, sir.

THE COURT: All right. So what did you do to eliminate this problem?

THE WITNESS: Well, if I may finish with the schedule here.

THE COURT: Okay.

THE WITNESS: They came down on the bottom right-hand column, they arrived at a 5.7% of the total claims as being excessive due to these outside purchases. They at the bottom of the schedule multiplied 5.7% of $51,000,000, which was their estimate of the total wholesale incentives to be paid in 1971 to arrive at an estimated excess of 2.9 million dollars because of outside purchases, excess outside purchases.

THE COURT: How do you get the profit entry?

THE WITNESS: I'm not sure how that was arrived at, sir.

BY THE COURT:

Q What steps were taken after this? Did you cut out the independent jobber-wholesalers for selling the parts involved here, or what did you do?

A Well, sir, as a result of this we stepped up our attempts to get the WINS claiming system put into effect.

Q Does the WINS claiming system enable you to determine that a Ford dealer who is claiming a wholesale incentive allowance from Ford and who has in fact bought from an outside jobber, does the WINS system enable you to determine that?

A No, it does not. All the WINS system tells us is by the hundred product lines it compares the claims submitted by each of those product lines over a period up to twelve months with the purchases that he made from us in each of those product lines during the same period.

The incentives on the purchases that he claimed from us, that is the comparison that the WINS system makes.

Q That would help you determine?

A Yes, sir, it helps us determine.

Q If a Ford dealer is claiming wholesale incentives on things he actually bought from an outside

independent jobber-wholesaler that method you have just described to me would help you determine that, wouldn't it?

A Yes, sir.

Q That's the whole point, isn't it?

A Yes, sir, but the question you asked was, would it tell us that he had in fact bought from an independent jobber, and it would not, for a variety of reasons: Possibly his inventory had changed, possibly he was selling down his inventory during this period, and that is why his claims exceed his purchases from us. That is a possibility.

Q But at least it would allow you to make a comparison of the kind you made?

A Yes, sir, it's helpful.

Q From there, suppose you find that the purchases of the wholesale incentives greatly exceed the purchases from Ford.

What do you do then?

A We would ask for a field audit to be made of that dealer.

Q And you have to do that in the case of these Autolite and Motorcraft situations because they can still buy from outside jobber-wholesalers, can't they?

A Yes, they can.

Q And they can do it perfectly legally, right?

A Yes, sir.

MR. MAC CRATE: I offer Defendants' Exhibit DA in evidence.

MR. JULIEN: I object to it, your Honor.

THE COURT: Overruled.

(Defendants' Exhibit DA was received in evidence)

CROSS EXAMINATION CONTINUED

BY MR. JULIEN:

Q Mr. Beers, I show you a copy of Defendants' Exhibit DB for identification and ask you, please, to identify that document.

A This is a paper prepared by the forward plans department, June 25, 1971, dealing with the estimated ineligible claims due to outside purchases in the Cincinnati test for the fourth quarter of 1970.

Q What is the relationship, Mr. Beers, of Exhibit DB to the immediately previous exhibit, Exhibit DA?

A They appear to have segregated the competitive parts from the Cincinnati test, have shown the amount of overclaim on competitive parts and have used this

factor and applied it against the estimated claims on competitive parts for the year 1972 to arrive at a total estimated ineligible claims, which is not shown.

THE COURT: I don't understand.

Is DB just an explanation of DA?

THE WITNESS: No, sir.

If I may explain, your Honor, we called Detroit last night and asked them to send in any studies that they had that might deal with this question that you asked: Do we have any estimates of the total ineligible claims.

These exhibits were sent in to us this morning, and I don't recall ever seeing this exhibit before. I can tell you what it purports to be, sir. But that is the basis of how we got these exhibits.

THE COURT: Now, the second paragraph of Exhibit DB has an 8.5 percent figure.

Where does that come from?

THE WITNESS: Apparently, your Honor, that is the overclaimed amount related just to competitive parts.

THE COURT: Excluding what?

THE WITNESS: Excluding all other Ford brand parts -- no, I am sorry --

THE COURT: Excluding crash parts?

THE WITNESS: Excluding crash parts. I guess that's all that would be excluded.

THE COURT: Refresh your recollection? It makes a difference to me what these studies relate to. If they include or don't include crash parts. You really don't know even on DA, do you?

THE WITNESS: This is all parts. Is this DA, sir?

THE COURT: Yes.

Are you sure?

THE WITNESS: Yes, sir.

THE COURT: But do you know if in fact there were any erroneous claims included in DA based on crash parts?

THE WITNESS: No, I do not, sir.

THE COURT: Now, on DB, what does DB relate to?

THE WITNESS: It says it relates to competitive parts, your Honor. And that's all I know of. I don't know the detail behind this particular study.

THE COURT: And again, competitive parts would exclude crash parts but would not exclude Motorcraft or Autolite or Ford branded parts; the Ford branded parts

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that are non crash parts.

THE WITNESS: I believe so, your Honor.

THE COURT: Okay.

MR. MAC CRATE: I offer this in evidence, your Honor, as evidence of estimates being made by Ford at that time.

MR. JULIEN: I object to it.

THE COURT: I will receive it.

(Defendants' Exhibit DB was received in evidence)

MR. JULIEN: No proper basis.

Q Mr. Beers, I show you Defendants' Exhibit DC for identification and ask you, please, to identify that.

A Yes, sir. This is a summary prepared by the incentive control analysis section, July 7 of 1971, and it's a calculation of the potential savings through the elimination of payments on outside purchases.

This study is based, again, on the Cincinnati test, the results of the Cincinnati test, and certain adjustments were made to the data, total data in the Cincinnati test, to eliminate what appeared to be unusual situation, to try to get a more conservative look at the erroneous claims because of the outside purchases.

In addition, they came up with the percent ineligible based on the various amounts of claims that dealers were submitting.

They applied these ineligible percents to the estimate of competitive parts payments to be made in 1973 to arrive at an estimated savings of $1,100,000.

THE COURT: The columns at the left: Average claim amount.

Why do you have it broken down into different categories, below $250, $251 to $500, and so forth?

THE WITNESS: Because we thought that there might be a difference -- we were talking about the total versus -- there might be a difference between the claiming habits of dealers submitting small claims and dealers submitting larger claims.

THE COURT: How did you get the third column from the left, single source payments?

THE WITNESS: This was an estimate of the crash parts, the payments on crash parts incentives that would be made in the year 1973.

THE COURT: Well, single source goes beyond crash parts, doesn't it? All Ford branded parts are single source goes beyond crash parts, doesn't it? All

Ford branded parts are single source , aren't they?

THE WITNESS: Yes, I believe you are right. No, no, sir.

THE COURT: Do you know what is included in the single source?

THE WITNESS: I'd have to say I do not, I am not that sure.

THE COURT: And then your estimate of percentage ineligible, how did you get those figures?

THE WITNESS: These were the figures take from the test of the twenty Cincinnati dealers and the relationship of the dealers that fell into these various categories, the relationship of the excess due to outside purchases to the total claims.

THE COURT: On this question of the parts, the Motorcraft and Autolite are parts that are distributed either directly to the dealers or through the distributor warehouse?

THE WITNESS: Yes, sir.

THE COURT: Now, I have heard reference, and I guess I really haven't heard it completely defined, the Ford branded parts.

Are you familiar with that term?

THE WITNESS: Well, yes.

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THE COURT: Now, are crash parts included in the Ford branded parts?

THE WITNESS: Yes, sir.

THE COURT: And crash parts it has been stipulated are single source parts.

THE WITNESS: Yes, sir

THE COURT: Are there other Ford brand parts - besides the crash parts?

THE WITNESS: Yes, sir, there are Ford branded competitive parts.

THE COURT Ford branded. Are there Ford branded parts that aren't crash parts that are single source parts?

THE WITNESS: There may be, your Honor.

THE COURT: You just don't know.

THE WITNESS: No, sir.

THE COURT: But there are Ford branded parts which are competitive parts, just like Autolite and Motorcraft?

THE WITNESS: Yes, sir.

THE COURT: Now, what I am wondering is, where did you -- I know you don't know, but just sitting here now, is it your belief that the single source payments on Exhibit DC would be mainly crash parts?

THE WITNESS: I would believe they would be mainly crash parts, sir.

THE COURT: Now, this relates to outside purchases, right?

THE WITNESS: Yes, sir.

THE COURT: Now, where is the Ford dealer going to make an outside purchase of crash parts?

THE WITNESS: He could make it from another Ford dealer, and we have a provision for that sort of thing happening. This is the emergency sale kind of thing. He could purchase these parts from another Ford dealer.

And what we were trying to do here, you notice, we did not assume there would be a WINS system would save anything in that area, and that would be because we assumed that the purchase of individual parts in that area would be small quantities and would not be flusned and highlighted in this WINS system.

THE COURT: Let's go back to the single column.

If a Ford dealer buys a single source part from an outside purchaser -- wait a minute.

Let me start once more.

The columns headed single source payments

and competitive part payments, that would all be contrary to your policy, wouldn't it? They are all negligible.

THE WITNESS: No, sir. Those are columns that show the totals that we expect to pay on these types of parts.

THE COURT: And they are not just limited to outside purchases?

THE WITNESS: No, sir.

THE COURT: It is the outside purchases that are really reflected in the ineligible column.

THE WITNESS: Yes, sir, that's right.

THE COURT: Let me ask you this: Did you ever try to make any estimate? Looking at that chart over there which you have been using, did you ever try to make any estimate of how much of your outside purchase ineligible claims related to people who had bought from a jobber-wholesaler or who had bought from another Ford dealer?

THE WITNESS: No, sir, we haven't, to the best of my knowledge.

THE COURT: Did you ever consider cutting out the jobber-wholesalers as a channel in distribution in order to take care to prevent these ineligible wholesale incentive claims?

THE WITNESS: I wouldn't be involved in those kinds of deliberations, sir.

THE COURT: Okay.

THE WITNESS: One other source , if I may, of you -- you know, these single source items, dealers could buy these parts from intermediaries, brokers, expediters, you know, that may be engaged in cross selling between dealers. That could happen.

THE COURT: All right, you offer Exhibit DC?

MR. MAC CRATE: I do, your Honor.

MR. JULIEN: I object.

THE COURT: I will receive it.

(Defendants' Exhibit DC was received in evidence)

THE COURT: Does that complete your offer?

MR MAC CRATE: Yes.

THE COURT: You go ahead with your cross.

MR. JULIEN: May I have a minute or two?

THE COURT: Sure.

(Pause)

THE COURT: Mr. Beers, it would just seem to me thatthe most prolific source of these erroneous wholesale incentive claims would be by dealers who bought Motorcraft and Autolite parts from the jobber-wholesalers

that are indicated on that chart.

Now, I am wondering, you have hundreds of specific audits of dealers on the question of ineligible claims; right?

THE WITNESS: Yes.

THE COURT: Do you have any memory at all--did you read those audits?

THE WITNESS: Yes, sir, I read most of them.

THE COURT: You read most of them.

Now, do you have any memory at all as to whether or not my assumption is right, in other words, that the bulk of erroneous wholesale incentive claims would come from people who had bought Motorcraft and Autolite parts from the jobber-wholesalers and were trying to get incentive claims?

THE WITNESS: My problem in responding to you, sir, is that some of our audits, the sheets that I read, just say there is a certain amount disallowed because of outside purchases. They don't say where they came from.

THE COURT: Or what kind of parts?

THE WITNESS: Not necessarily, sir.

THE COURT: Are most of the disallowances because of -- I guess by definition they would be purchases from outsider sources, wouldn't they?

THE WITNESS: No, sir, they are many disallowances on parts that are purchased from Ford that are sold to ineligible customers.

THE COURT: Okay, in other words even bought from Ford and sold to ineligible customers?

THE WITNESS: Yes, sir.

THE COURT: I guess you have already answered this: You really can't tell me, you have no memory at all, to tell me the portion of the erroneous disallowed claims that relate to purchases of Motorcraft and Autolite parts from outside sources?

THE WITNESS: No, sir, I cannot tell you any proportion, I know there are a lot of them, I know there are a lot of disallowances from purchases from Ford dealers. I have seen claims that spell in large amounts each of those out.

I just don't have any ability to make a ratio.

THE COURT: In other words, from the jobber-wholesalers and from other Ford dealers?

THE WITNESS: Yes sir.

THE COURT: And I take it you never really tried to find out specifically the extent of the problem of people buying crash parts from outside purchasers?

THE WITNESS: No, sir. We have looked at this

as a total.

THE COURT: But you have never really tried to find out the problem of people buying crash parts from outside sources?

THE WITNESS: No, sir.

THE COURT: Okay.

BY MR. JULIEN:

MR. JULIEN: I am going to try to be as brief as possible, if your Honor please.

I am going to take these in the order in which they were received.

Q The CX, you recall -- you have that?

A Yes.

Q You have that?

A May I see this?

Q Yes.

Were there any records kept concerning audits? Now, I am not talking about incentive crash parts, but concerning audits, made before 1968? Really, that's not in this exhibit, but I am just asking you that in general.

A Yes, I believe there were.

Q The auditing machinery has been an integral part of the Ford Company for sometime even prior to that?

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A Yes, sir.

Q And how long?

A It goes back into the '50s, I believe, sir.

Q And these auditors engaged in the regular course of their work would be making audits, substantially of the type that you have referred to even back prior to '68?

A They were auditing these types of claims, yes, sir.

Q And before 1972, could you give us an idea of how many auditors the Ford system had to conduct audits of its franchise dealers at a selective process where you choose some to be audited? How many auditors did you have doing that kind of work?

A Well, at the time we had the audit responsibility for the division, we had two auditors, but auditors from the vehicle divisions, Ford and Lincoln-Mercury division would also audit wholesale incentive claims when they audited dealers.

Q And just so that we could have an idea, could you tell me in the aggregate what this corps of auditors amounted to?

A I do not know.

Q Approximately will do, I just want a ballpark

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figure.

A I am sorry, I do not know. I really don't.

Q Is it roughly about the same before or during the years '70, '71, '72, '73 and '74?

A I really don't know, sir.

Q You have seen their audits? They come across your desk, do they not?

A Yes, sir.

Q And just your best idea is the amount of men being devoted to this work about the same?

A Well, maybe I can answer that by looking at the number of audits that were conducted.

Q I just want an estimate.

A It would be roughly the same.

Q All right, that's good enough for our purposes.

Now, if I ask you a question that is in any way repetitious it may be that I didn't quite get it the first time, but on CX where you have the figure of $84.8 million for this entire period from '68 to '74, this, I take it, is an actual figure, is it?

A Yes, sir.

Q I mean, cutting off the odd dollars?

A Yes, sir.

Q Now, the rough ratio which the total bears to the

incentive bearing parts is roughly three and a half, is that right?

A Roughly, yes.

Q Now, I want to take you to CY. In this case --

A May I see what schedule you are referring to?

Q Yes, you don't have them by number?

A No, sir.

Q They are right in the corner.

A I didn't notice that. I am sorry.

Q Okay. CY, the column headed "Amount Disallowed". There you have attempted no breakdown with respect to competitive or non-competitive, is that correct?

A That's correct.

Q Or crash or non-crash, is that a way of putting it?

THE COURT: He doesn't give the breakdown.

MR. JULIEN: What did you say, sir?

THE COURT: It's obvious from the exhibit it doesn't give a breakdown.

Q Now, in the cases of these dealers, were you following the procedures which you described for the audits which were made which are the subject of that long Exhibit S, by flagging those where you had a suspicion that their claims were not in proportion with their

purchases?

A In general, that is the way we selected the dealers. We used various tests to come up with that kind of information.

Q I understand. So it would be fair to say, would it not, that in Exhibit CY, the amounts disallowed with respect to the dealers are with those dealers which seemed most prominent to come to your attention because of your suspicion that there was wrongdoing there?

A Yes, sir.

Q And thus it would perhaps be somewhat erroneous, would it not, to attempt to extrapolate the percentages of disallowances from those highly suspicious dealers over the entire length and breadth of your franchise dealers, isn't that so?

A Yes, I would agree with that.

Q This Exhibit CZ, that is your three-page exhibit, once again, with respect to your audit period that is nowhere specified or reflected in this exhibit, is it?

A No, sir.

Q And this was prepared by you?

A For my own information, sir.

Q Yes. Well, whatever.

A Yes.

Q It was prepared by you?

A That's right.

Q Were you using as the source of any of the information which you reflected here any of the audits which had been part and parcel of Exhibit S?

A Yes, sir. They were all used.

Q So that when we come on the first page to that paragraph which is headed, "Wholesale Sales", what you did was to take the experiences which you gathered in Exhibit S and use that to arrive at certain percentages; am I correct?

A Yes, sir.

Q And Exhibit S in addition to having just the suspect dealers whom you had flagged also with respect to some of them reflects the experience of

not a five-month audit, but audits extending up to eighteen months, or possibly two years; is that true?

A I'm sorry, I missed the first part of your question.

THE COURT: The sample you took, the percentages were figured on the basis of the five-month test period, were they not?

THE WITNESS: Yes, sir. Over in that --

THE COURT: That is shown by the --

THE WITNESS: That left-hand set of figures.

THE COURT: Right.

BY MR. JULIEN:

Q Yes, but you see now just as for example if we look at the line for Central, and that's one we are most familiar with, your figures for the five-month period on the left-hand side of the page are precisely the same as your figures for the total audit on the right-hand side of the page; isn't that so?

A Yes, sir.

Q And aren't you aware that the audit made --

THE COURT: I don't mean to interrupt you, Mr. Julien, but it is apparent from the first page of Exhibit CZ that the percentages are figured on the basis of the five-month test period and the reason that

is apparent is that the dollar figure for disallowances is $83,165, and that is the dollar figure for disallowances in Exhibit S for the five-month test period.

MR. JULIEN: I'm not making my point properly, your Honor. Perhaps if I stated narratively to you it will save time.

THE COURT: All right.

MR. JULIEN: Previous exhibits disclose that the audit of FLN and Central, which were combined on this sheet --

THE COURT: I recognize that. Where do you go from there?

MR. JULIEN: I go from here: That they are in error in error in saying that these are five-month periods because indeed these very exhibits disclose that these are figures they came with in within a year and a half.

THE COURT: There is no question about that.

MR JULIEN: And they are not segregated --

THE COURT: How does that relate to Exhibit CZ which is what you are talking about now?

MR. JULIEN: CZ incorporates in error, we believe, not only as to that one, but as to others, it incorporates a figure allegedly representing a five-month

experience which indeed represents a year and a half.

THE COURT: Where does it incorporate erroneously something representing a year and a half or so? Where does it?

MR. JULIEN: That figure appearing on the left-hand side is a year and a half figure, your Honor.

THE COURT: You're pointing to Exhibit S?

MR. JULIEN: Yes, I am pointing to Exhibit S. A previous exhibit showing the audit discloses that they have audited --

THE COURT: Where is the year and a half figure? If you would just point out where it appears on Exhibit CZ it would save me a lot of time.

MR. JULIEN: The year and a half figure appears in the right-hand column.

THE COURT: Of what?

MR. JULIEN: The same line.

THE COURT: Of Exhibit CZ?

MR. JULIEN: Yes.

THE COURT: Where? Have you got Exhibit CZ before you?

MR. JULIEN: No, I am talking about Exhibit S. I am talking about Exhibit S.

THE COURT: I am terribly sorry, I thought you

were --

MR. JULIEN: Let me try it again, your Honor.

THE COURT: I thought you were examining him about Exhibit CZ.

MR. JULIEN: Yes, I was, and I was taking him back to what he claimed to be one of the footings, one of the bases for the entries made in Exhibit CZ, to wit, Exhibit S.

THE COURT: Yes.

MR. JULIEN: And he says Exhibit S represents a five-month experience, and I am pointing out to him and to your Honor that with respect to some of these dealers on Exhibit S it does not represent a five-month --

THE COURT: I know that. I know that. It is crystal clear. But there is part of the information on Exhibit 2 that does, according to his testimony, relate to a five-month period. Part of the information represents a longer audit period. The one figure that I can see on Exhibit CZ which is derived from Exhibit S is the figure relating to the five-month test period.

MR. JULIEN: What I am trying to establish, your Honor, and perhaps I am not doing it in a workmanlike manner, I am trying to show you, sir, that what he says is a five-month period is in truth and in

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fact not a five-month period.

THE COURT: Please, if you could just stop talking in generalities and show me what figure you claim was taken from Exhibit S and put into Exhibit CZ, which you claim is erroneous. Just name me the figure.

MR. JULIEN: I have to talk to some extent in generalities, because --

THE COURT: But we are not getting any place with generalities. So you tell me the figure that is brought over to Exhibit CZ that you are talking about.

MR. JULIEN: Your Honor, under wholesale sales he takes an experience --

THE COURT: What is the figure? Just give me a dollar figure and point out where it appears on Exhibit CZ.

MR. JULIEN: It would be any one of either claims that exceed test, claims that do not exceed test, filings included to avoid distortion. This is based on an experience of these 57 dealers in Exhibit S, and he says that's a five-month period we examined.

THE COURT: Have you got Exhibit S before you?

MR. JULIEN: Yes, I do.

THE COURT: Now look, I want you to look at Exhibit CZ.

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MR. JULIEN: Yes, sir.

THE COURT: Now you see the bottom of the first page of Exhibit CZ?

MR. JULIEN: Yes, sir.

THE COURT: You see the figure $83,165.

MR. JULIEN: Yes, I do, sir.

THE COURT: All right. Now look at the second page of Exhibit S and look at about the middle of the columns at the top where it says total. You see what the figure there is? It is $83,165.

MR. JULIEN: Yes.

THE COURT: And that, according to his testimony is a five-month figure, test period figure, less than the broader figure of $172,000. But it is the $83,000 figure that is brought over into Exhibit CZ.

Now, have you taken that into account in your comments on Exhibit CZ?

MR. JULIEN: Yes, sir.

THE COURT: Well, I don't think you have.

MR. JULIEN: My point is, your Honor -- forgive me, your Honor, believe me I have.

THE COURT: All right.

MR. JULIEN: What I'm trying to tell you, sir, is that when they are saying this is a five-month experience,

I have with respect to at least one and possibly more of the dealers proof that what they have entered on the five-month side is in truth an audit of a longer and extended period, and that the figure shown with respect to Central of emergency sales, for example, 1459, or, 2185, which is the total both in the five-month period and in their total audit, really is an audit which is not five months, but is a year and a half. This affects percentages,does it not?

THE COURT: I see your point now. All right, I get your point.

MR. MAC CRATE: But I think Mr. Julien is in error, too. I don't think there is any fourteen-month period involved.

THE COURT: Well, I don't know about that.

BY MR. JULIEN:

Q Assuming for one moment that your figures in Exhibit 5 on the left-hand side with respect to some of these entries does not really represent any five-month study, but represent in some cases a nine-month study, and in some cases more than a year's study; would that affect your calculations?

A You put the question, assuming those things --

Q Yes. I'm asking you to assume it for the

moment.

A Yes, that could affect the calculations to some extent.

THE COURT: How would it affect the calculations?

THE WITNESS: Well, if you used a longer period for one dealer than nine months it could throw off your assumptions for the total claims for the year, because our projected five months' claims for those dealers into a total year. And it could throw it off in that respect, sir. I don't think it would throw it off in any other respect because the total claims were measured -- against the disallowances, were measured against the total claims to get a percentage, and as far as -- well, inaccuracy, this is an estimate, sir, of the total of the claims that I have there for the year, that I had estimated for the year are $44,500,000, I believe the schedule shows that we paid 45.8 million dollars claims in that year, in actual number. So it is an estimate and it might throw those total year claims off slightly, but I don't see how else.

THE COURT: Well, wait a minute. In other words, you really on Page 2 in order to arrive at your estimate of claims to be made for the full year

1969 extrapolated from the --

THE WITNESS: Five months.

THE COURT: [continuing] From the five months.

THE WITNESS: Yes, sir.

THE COURT: Now where did you get your five-month claims to extrapolate from?

THE WITNESS: Well, the total I got from our records showing the amounts, total amounts of claims we had paid for the five months. The claims over $24,000 I took from the tests, statistical tests of the 457 dealers which showed the claims paid to them for the five-month period.

THE COURT: Where do we go from here? I get your point, Mr. Julien.

MR. JULIEN: The rest I can cover in my brief, your Honor. I can show that from the exhibits.

THE COURT: All right, fine.

MR. JULIEN: So we don't have to spend a great deal of time on it.

THE COURT: All right.,

BY MR. JULIEN:

Q Now, since you segregate shop sales -- now I am back on Exhibit CZ your Honor -- since you do segregate your shop sales and wholesale sales, I take it that the

shop sales have no relationship to the wholesale sales; is that correct?

A They are reported separately on the wholesale center claims, sir.

Q Now, even with respect to these particularized franchise dealers whom you used as the basis for your examinations as shown in Exhibit S and carried forward into these exhibits offered today, there were many reasons why some of their incentive claims were disallowed; true?

A I don't understand your question, sir.

Q Well, you were estimating, or, you were auditing these particular 37 to see whether their incentive allowances were appropriate or not; isn't that so?

A Yes, sir.

Q Now, with respect to the claims that exceed tests on page 1, you selected ten of the 37; is that correct?

A Yes, sir.

Q Any itemization as to how many of these allowances, amounts of claims or audit findings as to each of these ten involved crash parts?

A No, sir.

Q By the way, with respect to some of these

dealers whom you audited and whose names appeared in Exhibit S, after the audit where you made certain disallowances you made a charge against the dealer; is that correct?

A Yes, sir.

Q And that was the end of the matter; is that right?

A We charged the disallowances back to the dealer, yes, sir.

Q No cancellation of franchises?

A Not that I'm aware of, sir.

Q His Honor asked you a question about the jobbers and the wholesalers in the non-crash part distribution. You told him that no action was taken with respect to them. Was there any action taken to achieve the method of dealing with the jobbers and the wholesalers in the non-crash part distributive system?

A I guess I don't understand what you mean by change in the method of dealing with them. I don't understand.

Q Well, may I set up on the chart which has been received --

THE COURT: I think I asked him if they -- which is obvious they didn't -- did they cut out the

distribution of Motorcraft and Autolite.

MR. JULIEN: I am not repeating that. I'm asking whether they did anything with respect to any other method to attempt to eliminate, or cut down the profitability of wholesalers or jobbers in the non-crash distribution system.

MR. MAC CRATE: That's a wholly different question.

THE COURT: Do you understand the question?

Q Do you understand my question?

A You asked me if there were any efforts on our part to cut down the profitability?

Q Yes.

A Warehouse distributors?

Q No, jobbers and wholesalers in the non-crash part distribution.

A I don't know of anything that I or my people did to do that.

Q On the second page of this example you told us that you made certain arbitrary assumptions. You said that to the Court. Were these the assumptions which you made to extrapolate the percentages arrived at at Page 1 into a broader area as shown on Page 2?

A Yes, sir. In applying them to the smaller

claiming dealers.

Q So that what appears on Page 2 can we say that would be speculative? Is that correct?

A It's an estimate, certainly.

Q Exhibit DA. You chose the Cincinnati district to make that special study, did you, of twenty dealers?

A I didn't choose it. It was chosen by people in the division.

Q Was there any special reason for choosing that particular area for that study?

A I do not know why it was chosen.

Q Did you ever inquire ?

A Not that I recall, except that I believe it was considered to be a representative area where dealers would cooperate with us in allowing us to copy information off their records.

Q Well, you have that right to make audits anyway, don't you?

A Yes, sir.

Q You have arranged columns, or your company has arranged columns with respect to the product lines. I suppose those product lines are the lines which you now specify in your WINS system?

A Some of them, yes.

Q Some of them. Is it more detailed than WINS?

A Oh, yes -- no, no. WINS is more detailed than this.

Q That is what I mean.

A Yes, sir.

Q WINS is more detailed.

A Yes, sir.

Q But even before WINS came into effect, and I think you told us that was in 1972.

A Yes, sir, January of 1972.

Q Even before WINS came into effect you did have this means of flagging suspect outfits, conducting audits and finding out where there had been improper wholesale claims made?

A Yes, sir.

Q What is that column called, Fran? Is that franchise?

A Yes, sir.

Q What does it mean where you have "F/AM"? What is that?

A I am guessing, but I believe that's Ford American Motors.

Q I see.

THE COURT: "LM" means Lincoln Mercury?

THE WITNESS: I believe so.

THE COURT: All right.

Q The first column on the left-hand corner where it says write in, and some of these names have checks against them, could you tell us what that means?

A No, sir, I can't. I believe I can guess.

Q Well, I am not asking for guesswork.

A All right.

Q I see no column for crash parts. His Honor did ask you about that before. Was that because the incidence of claims respecting crash parts was so small that you did not set up a column for it as you did with respect to the items occurring more frequently?

A I would assume that, yes.

Q Several times in the colloquy you had with the Court awhile ago you did mention that purchases made by one dealer from another dealer, franchise dealer, you understand --

A Yes, sir.

Q [continuing] on an emergency basis, that was understood and permissible; is that right?

A Yes, sir.

Q And in some of these exhibits which were received this afternoon, are these transactions from

one dealer to another, are they reflected in any of these exhibits?

A No, they would not be because those transactions would be eligible sales.

THE COURT: An emergency sale from one Ford dealer to the other, the first Ford dealer could take the discount; is that right?

THE WITNESS: Yes, sir.

THE COURT: The second one, of course, couldn't.

THE WITNESS: That's right.

THE COURT: All right.

Q However, your system might have been before --

MR. JULIEN: I will withdraw that. I think your Honor has covered that subject.

Q Now, on Exhibit DB --

MR. JULIEN: Your Honor asked the very question I had in mind on that one, and I will pass that up, too.

Q Now, Exhibit DC. I'm not sure whether this has been covered, it may well have been, but on Exhibit DC, the heading, "Outside Purchases" does include, does include, does it not, purchases of non-crash parts?

A Yes.

Q And here again no breakdown is available; is that right?

THE COURT: That's obvious. We have covered that.

MR. JULIEN: We did. I thought it was with respect to another exhibit, but, yes, sir, I agree now.

Q And the figures arrived at in Exhibit DC, are they as a result of an extrapolation where you have used the percentages you gained from a study of Exhibit S, those are the 37 dealers?

A No, sir.

Q Where did you get these figures covering all parts as total projected payments? Where did you get that from?

A These were estimates made by the incentive control analysis people.

Q Are the working papers from which the formula which was employed to arrive at this estimate, is that available?

A No, sir. I do not have it.

Q Have you ever seen this document before, this Exhibit DC?

A I don't recall, sir.

Q And how they arrived at these estimates you cannot say?

A No, I cannot.

THE COURT: I thought this was somehow an offshoot of the Cincinnati study.

THE WITNESS: It is, sir.

THE COURT: And are the percentages, where you have that column percent ineligible, is that derived from the Cincinnati study? Are those percentages?

THE WITNESS: Those are percentages derived from the Cincinnati study, but excluding certain dealers that our people felt where the relationship was unusual and shouldn't be used to try to project it into a total universe.

THE COURT: Why was there a specific study done with respect to outside purchases?

THE WITNESS: To try to estimate the value of this proposed new claiming system, the WINS system for claiming incentive.

THE COURT: In other words, you felt that the WINS system would hit the outside purchases situation?

THE WITNESS: We felt that it would give us a lot better information on those and enable us to do a better job of auditing dealers and controlling that situation, yes, sir.

THE COURT: What is left, if you cut out the erroneous claims based on outside purchases, exactly

what do you have left in the way of potential erroneous claims, in categories?

THE WITNESS: We have claims to ineligible customers.

THE COURT: Yes. Now, meaning what? Claims to --

THE WITNESS: Insurance companies, to retailers, even to other Ford dealers.

THE COURT: In other words, the claim made by the seller.

THE WITNESS: By the seller.

THE COURT: Who is selling to another dealer.

THE WITNESS: Another Ford dealer.

THE COURT: Or the selling dealer who is selling to an insurance company.

THE WITNESS: Yes, sir. Sales to jobbers or brokers, intermediaries.

THE COURT: Some intermediary.

THE WITNESS: Yes, sir.

THE COURT: All right. Now, I want to ask you, did you believe that the bulk, or the majority of the ineligible claims was in the category of outside purchases?

THE WITNESS: My opinion, sir, was that they were both large. They were fairly evenly divided.

THE COURT: Fairly evenly divided. Now, the WINS system really is it correct that the WINS system would not ferret out or improve your control over the -- anything but outside purchases? Am I right on that?

THE WITNESS: Well, that was the main thrust of the WINS system. However, it always developed certain percentages, relationships between claims that the dealers were submitting and data that they were submitting as to the financial statement. That could also help highlight some of these other sales that may be --

THE COURT: Some sales to ineligible customers?

THE WITNESS: Yes. For example, if a dealer had a lot of shop sales this might indicate to us that he was selling to insurance companies or to ineligible customers, that he was claiming on repairs that he had made to ineligible customers to his shop.

THE COURT: Now, did you ever make any study, similar to the Cincinnati study, to specifically determine the amount of ineligible claims coming from the fact that selling dealers were selling to ineligible customers?

THE WITNESS: No, sir. The only other study would be this one that we have looked at for the 1969 test.

THE COURT: Which just includes all forms of ineligible claims?

THE WITNESS: Yes, sir.

THE COURT: But no specific study like the Cincinnati study?

THE WITNESS: No, sir, not to my knowledge.

THE COURT: All right, Mr. Julien.

MR. JULIEN: There is just one exhibit when we left off yesterday, one of the four that the witness has produced as the examples which he had given to you orally.

THE COURT: Okay.

MR. JULIEN: I am sorry, I don't have a number on it yet. May we have that marked in evidence.

(Plaintiff's Exhibit 117 was marked for identification)

xx

MR. JULIEN: I offer 117 in evidence.

THE COURT: What does that relate to?

MR. JULIEN: This is the fourth of the examples.

MR. MAC CRATE: It's Bob Rice Ford, Boise, Idaho.

THE COURT: What date?

MR. JULIEN: August 21, 1968, your Honor.

THE COURT: Do you have any more cross?

MR. JULIEN: No, sir.

THE COURT: Do you have any redirect, Mr. MacCrate?

MR. MAC CRATE: I would like to inquire, your Honor, about 117 for identification. I do not recall any testimony about this.

THE COURT: You may inquire, go ahead.

REDIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Beers, I show you Plaintiff's Exhibit 1-17 for identification and ask you if you can identify that document?

A Yes, sir, I can.

Q What is it?

A It is an audit report of the audit of wholesale parts incentive claims of Bob Rice Ford, Boise, Idaho.

Q Is the memorandum signed by you?

A Yes, it is.

Q Does this illustrate one of the examples that you gave to his Honor yesterday?

A Yes, it does.

Q Would you identify which example, please?

MR. JULIEN: Does that matter, your Honor, if it is one of the examples, we can certainly carry it out in our brief.

MR. MAC CRATE: I would like to have the witness' explanation as to what one of his examples it illustrates.

THE COURT: He just gave three specific -- you gave three examples, do you recall?

THE WITNESS: Yes.

THE COURT: Does this illustrate one of them?

THE WITNESS: Yes, sir.

THE COURT: Which is it?

THE WITNESS: I believe it's the last one. It's where the dealer was selling to a fleet and buying parts at the same location as a jobber and buying similar parts back from the jobber.

THE COURT: Okay.

Anything else?

MR. MAC CRATE: I have no objection to that being entered in evidence.

THE COURT: Is it offered?

MR. JULIEN: Yes, I offered it.

THE COURT: I will receive it.

(Plaintiff's Exhibit 117 was received in evidence)

Q Mr. Beers, I show you Plaintiff's Exhibit 116 in evidence and ask you if that audit of Hillard has in it ineligible claims relating to sales to insurance companies?

A Yes, sir, it does..

MR. JULIEN: Just a moment, please. Your Honor, these four papers were given to me by the witness. He said these -- you remember, he walked off the stand to obtain them. Those show these examples.

THE COURT: Let's cut it short. If they say something you can brief it. You don't have to have him repeat what's in the exhibit and they are all in evidence and we can brief them and argue from them, anything you want to argue.

MR. MAC CRATE: There was a question on direct examination, your Honor, on this very point.

THE COURT: Okay.

Q Mr. Beers, I show you Defendants' Exhibit S and call your attention to the line second from the bottom: Hillard Ford, and ask you in which column on that schedule the disallowed amount with respect to a claim for sales to an insurance company is reflected?

A It's reflected in the column headed "Ineligible Customers" under the heading of "Shop Sales".

MR. MAC CRATE: If your Honor will give me just one minute. I have one possible final question.

Q Mr. Beers, I show you Plaintiff's Exhibit 96 and call your attention to the paragraph at the bottom of the page "Summary of Results" which includes the statement "Because of the discrepancies disclosed, the period audited was increased to cover incentive claims made from November 1968 through September 1969."

Showing you now Defendants' Exhibit S, can you identify for us what information taken from Exhibit 96 was carried forward to Defendants' Exhibit S?

A Well, I showed the total amount of the disallowances under the columns, the proper columns, under the total audit. These same amounts are shown under the return sales and emergency sales columns under the test period.

Apparently I did this because the auditor had not broken down the results for the January through May 1969 test period.

Q And the information was just given for November 1968 through September '69, is that --

A Yes, sir, that was the period of the audit, the total period of the audit.

MR. MAC CRATE: I have no further questions, your Honor.

THE COURT: Thank you.

Mr. Beers, you are excused.

Next witness.

(Witness excused)

A L F R E D T . H A N S E N , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Hansen, by whom are you employed?

A I am employed by the firm of Duff, Anderson and Clark, Incorporated.

Q Where is Duff, Anderson and Clark located?

A In Chicago, Illinois.

Q What is the business of Duff, Anderson and Clerk?

A Duff, Anderson and Clark is a firm of security analysts and financial consultants. We serve basically two segments of our business. We have an investment advisory service which is provided to institutional investors throughout the country, and secondly, we are involved in consulting work primarily for industry, some government work, involving many problems such as the valuation of closely held securities, valuations connected with acquisitions or mergers,estate taxes -- any area where an evaluation of a company is involved.

We are not involved as broker-dealers, nor are we involved directly in the management of money.

Q What is your position in Duff, Anderson and Clark?

A I am vice-president of the firm.

Q What are you responsibilities with the firm?

A I work in the area of financial consulting. I operate primarily in a supervisory category, working on a sum of different projects at a given point in time.

Q Would you briefly outline your educational background and any professional affiliation you may have?

A I am a graduate of the University of Wisconsin,

with a bachelor's degree in business administration. I also have a master's degree in business administration from the University of Wisconson. I am a member of the Investments Analysts Society of Chicago, also the Financial Analysis Federation, which is the national organization; I am a chartered financial analyst.

Q Have you personally made valuations of small, privately held businesses?

A Yes, sir.

Q Over what period of time?

A I have been in the field for about twenty-three years as an investment analyst. During that period, I have done evaluations of closely held securities for most of that period. The last few years I have been almost exclusively involved in valuation of closely held securities or publicly held as well.

Q What generally have been the purposes of the valuations of small businesses which you have been called upon to make?

A Primarily in connection with valuations for mergers or acquisitions and in some cases involving estate tax valuations, gift tax evaluations, acquisition of stock by -- of closely held stock by the company itself from another investor or things of that sort.

Q Have you been requested by counsel for defendants in this case to testify at this trial as an expert on valuation of small privately held businesses?

A Yes.

Q Are you being compensated by the defendants for your participation in these proceedings?

A Yes.

Q Has your firm performed any services in the past for the Ford Motor Company or the Ford Marketing Corporation?

A Ford Motor Company was a client of our investment advisory service for a period of about four years. It was taken by the financial department of Ford as a-parently a monitor for its pension fund investments which were run by outside parties. They ceased being a client in 1971.

We also were asked to look at a potential investment venture that Ford was asked to participate at one time, approximately four years ago. We spend about four days on it.

But that is the only connections we have ever had with Ford that I am aware of.

Q At the request of counsel for defendants, have you examined the plaintiff's proposed assessment of

damages and in particular Item I-E of Exhibit 116.

A Yes.

Q Have you also read the transcript of testimony in this action?

A I have read the transcripts for the first four days of the trial.

Q For the first four days of trial?

A Yes.

Q Have you examined the financial statements, FLM Collision Parts, Inc. which have been marked as exhibits in this action?

A Yes.

Q To what texts and other materials have you referred in connection with your preparation to give testimony?

MR. JULIEN: Text? I object to that.

THE COURT: Overruled.

MR. JULIEN: May I state the ground of my objection?

THE COURT: Yes.

MR. JULIEN: An expert witness may not bolster his testimony by reference to texts. That's cross examination. If it is to be used at all. I think that's somewhat a basic rule, your Honor.

THE COURT: Is that a basic rule?

MR. JULIEN: Yes, your Honor.

MR. MAC CRATE: Your Honor, to identify what has been examined in advance of coming to the witness stand is a most appropriate part of laying the foundation for the witness' testimony.

THE COURT: I don't have the faintest idea. Are you going to ask him about it in cross?

MR. JULIEN: About texts?

THE COURT: What texts he consulted?

MR. JULIEN: Depends on what he says.

THE COURT: Why don't you hold off. I will assume -- let's hold off.

Q Have you discussed these matters with me in advance of coming to testify today?

A Yes.

Q Have you examined the valuation of good will submitted on behalf of the plaintiff found in Item 1-E of Exhibit 106?

A Yes.

Q Do you agree or disagree with this valuation of good will?

MR. JULIEN: I object to it. It's for the Court to decide, if your Honor please.

THE COURT: That still is for the Court. I know.

Overruled.

MR. JULIEN: Sorry, would you bear with me for a moment. I don't contest for a moment that he may give his own evaluation, buthis agreeing or disagreeing with another witness makes no difference at all and is not permissible testimony.

THE COURT: It's just a form of getting his opinion.

I will overrule the objection.

Q Would you identify any specific disagreement you may have with the plaintiff's proposed valuation of good will?

MR. JULIEN: I object to it.

THE COURT: Overruled.

A I would disagree, first of all with the use of pre-tax income as a proper measure for computing the worth of a business or the good will of a business.

Secondly, I would disagree with the addition of officers salaries and pension fund expenses as a proper measure for arriving at the earnings of a company for evaluation purposes.

THE COURT: What do you mean, the addition?

THE WITNESS: Yes.

THE COURT: You would take them out.

THE WITNESS: I would take them out.

THE COURT: You would take out what?

THE WITNESS: I would take out officers salaries, your Honor, I would take out taxes, income taxes, before ariving at net income for purposes of evaluation.

THE COURT: So you would use an after tax figure which would of course have the officers salaries taken out as an expense, right?

THE WITNESS: Yes, your Honor.

THE COURT: Officers salaries and what?

THE WITNESS: And taxes, income taxes.

THE COURT: Okay.

THE WITNESS: I would further disagree with the use of an 8 percent return on tangible assets as a proper return on a business of this type.

I would disagree with the use of a multiple of ten times for a business of this type as not being appropriate, particularly as it is used against adjusted earnings, including income taxes and including officers salaries.

I also note that Mr. Wasser in his approach stated that he applied the methods outlines in Homer Harris'

book, New York State Practice Guide.

MR. JULIEN: I object to that, your Honor.

THE COURT: I will overrule the objection.

THE WITNESS: Mr. Harris outlined three methods in his application. However, it appears to me that Mr. Wasser has mixed elements of all three methods. I understand he relied primarily on method 2.

Finally, I have a fundamental difficulty with the application of any arbitrary methods of value or return on investment in arriving at separately either good will or the value of a company. I don't believe, certainly in my experience, or in actual practice, that the application of arbitrary measure is useful in arriving at values, since it does not take into consideration the many areas of sets of circumstances that are quite variable, that affect values of companies at any given period of time.

Q Would you now explain the reasons for each of these items of disagreement that you have referred to?

A In his testimony, as I indicated, he stated that he had --

MR. JULIEN: Now, Judge. This gets far beyond just disagreeing. I think what this gentleman is attempting to do now is not to state his own opinion concerning evaluations, but to state why he disagrees with another

witness. That isn't appropriate.

THE COURT: I will overrule the objection.

A In his testimony, he stated that he is relying on methods outlined by Homer Harris, and which are found on page 333 of that book for evaluating the good will of a company. Homer Harris outlines three methods but these are followed by a disclaimer that they are only methods and there are no rules that exist for evaluation.

The three methods basically are, first, the capitalization of average net profits for a representative number of years, multiplied by 10 or 15, depending on the business, with results representing the total value of the business, including good will.

The second method, which is referred to as the Federal Income Tax Method, which Mr. Wasser indicated that he relied primarily on, is to deduct from average net profits a percentage of the net tangibles, and capitalizing the result by multiplying by a fixed number. Adding the product to the tangibles furnishes the total value of the business. Note that no specific number or percentage or fixed number is suggested with Mr. Harris indicating that this depends on the nature of the business.

THE COURT: Does that give you good will or

total?

THE WITNESS: It gives you in the first case good will and added to the tangibles it gives you total value.

THE COURT: In the first case;what do you mean by in the first case?

THE WITNESS: By first deducting from net income a rate of return on tangibles you arrive at the return on the tangible assets of the business.

Secondly, multiplying the balance by the fixed number arrives presumably at the good will for the business, so the two together would be the total value of the business.

THE COURT: Let me understand.

What was the problem of Mr. Wasser's use of the second method?

THE WITNESS: I have to indicate further with Method 3 that he seems to have mixed the elements of all three.

THE COURT: You think he applied No. 2?

THE WITNESS: No, I think he mixed the elements of all three in arriving at his value.

The third method is called the year's purchase method, which also suggests taking, in this case, a 6 or 8

percent return on average capital involved over a representative number of years, and then deducting from this, from net profits, the result, and multiplying this by a fixed number.

Again, the number is not specified.

In his application he appears to have adopted the multiple of 10 from the first method, and then has utilized his 8 percent return plus another salary factor that he has implied. Apparently from Method 3.

THE COURT: Now, wait a minute. You think he got -- the Harris discussion of the first method has a multiple recommendation of 10 to 15, right?

THE WITNESS: Yes, your Honor.

THE COURT: Now, the second method, you have to use a multiple, don't you?

THE WITNESS: Yes, your Honor.

THE COURT: And they don't --

THE WITNESS: They don't specify.

THE COURT: - - and they don't specify. And the third method --

THE WITNESS: Suggests a return of a 6 or 8 percent of average.

THE COURT: On tangible assets.

THE WITNESS: On average capital involved in

the business over a representative number of years.

THE COURT: And that's different from tangible assets, right?

THE WITNESS: No, I believe it's the same.

THE COURT: Okay.

And then you use a multiple, after you have deducted the result from the profits, right?

THE WITNESS: Yes.

THE COURT: Do they suggest a multiple?

THE WITNESS: No. And later on in his book he uses examples of this method, utilizing a 6 percent return and multiple ranges from 5 to 10 times as to application, depending on individual circumstances.

THE COURT: Okay, what's your critique then?

THE WITNESS: It seems to me that he has applied the multiple of 10, taken from the first example as an arbitrary measure, and then applied the 8 percent return taken from example 3.

Further, I think the --

THE COURT: What's wrong with that? The second method doesn't suggest a percentage return, does it?

THE WITNESS: No.

THE COURT: And the second method doesn't

suggest a multiple?

THE WITNESS: No.

THE COURT: So what are we supposed to do? You have got to supply the figure, don't you?

THE WITNESS: Yes, sir.

THE COURT: So, what's wrong?

THE WITNESS: Well, I think further, I think the real problem with having done this, using these arbitrary figures, is that he then applies them to a pre-tax rather than net income figure, and also applies these measure to earnings before officers salaries and pension funds.

In no case does Mr. Harris suggest that you utilize pre-tax earnings, nor that you utilize earnings before officers salaries. In fact, at one point in his book he suggests that it is necessary to deduct a reasonable amount commensurate with the services rendered.

It is my opinion that officers salaries and income taxes are a cost of doing business and must be deducted before arriving at the return that the business provides an investor.

BY MR. MAC CRATE:

Q Have you completed your explanation?

A Yes.

Q In summary, Mr. Hanse, what would you regard as the errors made in evaluation of good will?

MR. JULIEN: Haven't we already had that now twice?

THE COURT: Are you going to give anything now that you haven't told me?

THE WITNESS: No.

THE COURT: Okay, let's not summarize.

MR. MAC CRATE: At this time, your Honor, I am going to present to the witness a hypothetical question, a copy of which has been marked CW for identification.

The witness has already reviewed the question, a copy has been furnished to Mr. Julien to expedite matters , it might be deemed read into the record.

THE COURT: We will just use the exhibit.

"Hypothetical Question

Assume:

the subject corporation was formed in April 1965 to engage in the wholesaling of a limited line of automotive parts, substantially all of which could only be purchased from franchised dealers of a single automobile manufacturer;

the business, which has always been located in Yonkers, New York, was generally limited to the purchase

of crash parts for automobiles manufactured by the single manufacturer and their resale principally in the Bronx and lower Westchester Counties in New York to approximately 230 independent body shops and garages;

the franchised dealers of the manufacturer also were engaged in the sale of the same crash parts directly to independent body shops and garages;

the demand for crash parts varies to some extent with general economic conditions reflecting individual decisions whether to repair their vehicles and whether to repair or to replace damages parts but it is principally dependent on the number of traffic accidents;

the franchised dealers repair automobiles in their own body shops but to encourage the franchised dealers also to act as wholesalers and to sell crash parts to independent body shops and garages at prices comparable to those paid by franchised dealers for crash parts used in their own body shop, the automobile manufacturer allows franchised dealers a wholesale incentive on what has ranged between 48% and 64% of the value of crash parts sold by the manufacturer;

the wholesale incentive on the resale by franchised dealers of certain crash parts was first granted November 1, 1968, at the behest of the Federal Trade

Commission and continued tobe granted by the manufacturer through September 30, 1972 and during 1970, 1971 and 1972 was fixed at 25 percent of the price paid by franchised dealers for eligible parts that they purchased;

upon its formation all of the stock of the subject corporation was owned by two individuals who have always been the only officers and directors of the subject corporation and who continued to September 30, 1972 to own all of its stock;

the two individuals each had, on September 30, 1972, between 10 and 20 years experience as assistant parts managers and parts managers for franchised dealers of the manufacturer and seven years' experience as the only supervisory personnel of the subject corporation;

the subject corporation began operations in 1965 with an initial investment of approximately $30,000;

the two individuals in carrying on the business of the subject corporation provided substantial personal service to its customers, including technical advice on ordering of parts, and provided its own delivery service of crash parts, which services may not have been available from franchised dealers of the manufacturer engaged in the sale of crash parts;

the subject corporation prior to July 15, 1972

had a written agreement with respect to the purchase of crash parts with one franchised dealer of the manufacturer and that agreement had been amended several times by oral understandings between the parties;

the only agreement which the subject corporation had relating to the purchase of crash parts on September 30, 1972 was an oral understanding with a single franchised dealer of the manufacturer;

the franchised dealer from whom the subject corporation was purchasing crash parts on September 30, 1972 had orally agreed that the price to the subject corporation would be the price paid to the manufacturer by the franchised dealer for the parts plus three percent and that the amount of any wholesale incentive allowance payable to this franchised dealer with respect to the resale of the parts to the subject corporation would be deducted from the price paid by the subject corporation;

in the fiscal year ended September 30, 1972 the subject corporation's gross sales were $736,967 and its net profit after taxes was $21,091;

the subject corporation's financial condition in the fiscal years 1965 through 1972 was as set forth in the following exhibits in this action:

Defendants' Exhibit BS Statement of Financial Condition

and Statement of Operating Results for the fiscal year ended September 30, 1965 (6 months)

Defendants' Exhibit BT — Statement of Financial Condition and Statement of Operating Results for the fiscal year ended September 30, 1966.

Defendants' Exhibit BU — Statement of Financial Condition and Statement of Operating Results for the fiscal year ended September 30, 1967.

Defendants' Exhibit BV — Statement of Financial Condition and Summary Statement of Operating Results for the fiscal year ended September 30, 196-.

Defendants' Exhibit BW — Statement of Financial Condition, Statement of Operating Results and Statement of General Expenese for the fiscal year ended September 30, 1969.

Defendants' Exhibit BX — Statement of Financial Condition, Statement of Operating Results and Statement of General Expenses for the fiscal year ended

September 30,1970.

Defendants' Exhibit BY — Statement of Financial Condition, Statement of Operating Results and Statement of General Expenses for the fiscal year ended September 30, 1971.

Defendants' Exhibit BZ — Statement of Financial Condition. Statement of Operating Results and Statement of General Expenses for the fiscal year ended September 30, 1972.

Question:

Assuming all of the foregoing facts, in your opinion what would be a fair and reasonable valuation of the subject corporation as of September 30, 1972?"

MR. JULIEN: I object to the question but I am going to object to the use of it too in place of it being a verbal question.

THE COURT: Have you read the question?

MR. JULIEN: Yes, indeed.

THE COURT: What's the objection?

MR. JULIEN: The objection is that it contains some material which I do not believe has been established in evidence.

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THE COURT: What material?

MR. JULIEN: Well, I would have to go through it specifically.

THE COURT: Well, go through it.

MR. JULIEN: Yes. I haven't heard anything on the demand for crash parts varying to some extent.

THE COURT: Where is that?

MR. JULIEN: That's the fourth paragraph.

MR. MAC CRATE: I submit, your Honor -

THE COURT: There is nothing in the record about that. I suppose it's --

MR. MAC CRATE: Your Honor, in Mr. Rowlands' testimony this subject was covered.

THE COURT: Well, did he testify that the demand varies to some extent with the general economic conditions reflecting individual decisions whether to repair their vehicles? I don't recall that.

MR. JULIEN: I have no --

MR. MAC CRATE: He did make general reference to that, your Honor, in the decision whether or not to repair.

THE COURT: Well, all right, I won't worry too much about that.

What else?

MR. JULIEN: Does that mean that is to be deleted?

THE COURT: No, I will allow that to stand.

MR. JULIEN: Now this part about franchise dealers repairing automobiles in their own shop and encouraging the franchise dealers -- the next paragraph, what has that got to do with evaluation of the plaintiff's business insofar as its good will is concerned? And I don't believe there is any proof to support that statement.

MR. MAC CRATE: Again, I believe the testimony of Mr. Rowland supports that paragraph, your Honor.

THE COURT: Yes, I think that is supported.

What else?

MR. JULIEN: The very next paragraph, we have got the Federal Trade Commission's behest in there again, and I am going to at the conclusion of defendant's case, since there is testimony with respect to this now, it doesn't depend upon a stipulation, I am going to once again ask you, you are deferring decision on that, to relieve me from any stipulation which says this is at the behest of .

THE COURT: Well, I am glad you brought that up, because I think that I will simply strike that

paragraph from the stipulation and rely on the exhibits. I am sure they are more precise. I don't know what really -- did you depend upon the statement that something was done at the behest of the Federal Trade Commission?

THE WITNESS: No, your Honor.

THE COURT: Well, of course you didn't. This has got a lot of stuff you wouldn't --

MR. JULIEN: Well, I have no objection to the second part of that paragraph that says --

THE COURT: The witness has said he didn't. I think it is irrelevant for consideration. But let's not quibble. It is a hypothetical question and if crucial parts are not supported by the evidence, then at the conclusion it is no good. Can't we leave it that way?

MR. JULIEN: Yes, I think so. I think that saves considerable time.

THE COURT: All right. Go ahead.

BY MR. MAC CRATE:

Q Mr. Hansen, assuming all of the foregoing facts, in your opinion what would a fair and reasonable valuation of the subject corporation as of September 30, 1972 be?

MR. JULIEN: Is this good will? Are you

addressing yourself to good will now?

MR. MAC CRATE: I'm addressing myself --

THE COURT: The total value.

MR. JULIEN: Total value.

MR. MAC CRATE: Valuation. Fair and reasonable valuation.

A In my opinion the value of the corporation as of September 30, 1972, is approximately $84,400, including tangible assets, subject to its liabilities, including good will.

THE COURT: Eight four thousand what?

THE WITNESS: $84,400.

Q Including good will, you said?

A Including good will.

Q Would you explain the reasons for your conclusion?

A In arriving at my opinion as to value of the subject company I have taken into account the various qualitative factors as outlined as they bear on the value of the company.

The qualitative factors include the small size of the corporation, the nature of its business, being primarily in the service industry, the capital requirements necessary to enter such a business, the

facilities required, the market served, its competition, the subject company's situation as to supply and the importance of the two individuals to the viability of the enterprise.

Essentially, the test of fair value is what a willing buyer will pay a willing seller in an arms' length transaction in which both parties are duly informed about the company.

As I stated earlier, investment, or company values basically are comparative in nature. An investor, in looking at a business, seeks to get the highest return on investment with varying opportunities in a wide spectrum of opportunities that he can look at, and he seks to get the highest return on his investment. After taking into consideration the risks that are involved in that investment.

In looking at the subject, I think the small size of the company is a relevant factor in assessing where it fits as far as investment interest is concerned. Many investors would not be interested, many potential investors would not be interested because of the small size of the business. Particularly larger corporations would not find the company of interest to them, based on its size. With sales of around $737,000 and net

income of $21,000 the company certainly ranks, must be classified as small even though its had good growth and earnings and sales. The fact that it's had good growth in itself is not unusual for small corporations in their early years of life.

I think the business generally classifies as a service business. Such businesses are quite easy to enter from an investment standpoint. I note for example that this business, the two individuals entered it with an investment of approximately $30,000 in 1965.

THE COURT: Could I just interrupt? Could I have Exhibit BZ.

MR. MAC CRATE: Here you are, your Honor. [Handing.]

THE COURT: All right, Mr. Hansen, go ahead.

A This amount of investment by most standards would represent a relatively small investment.

MR. JULIEN: A little louder, Mr. Hansen.

A I said this investment by most standards would represent a relatively small investment. Further, there are no specific facilities that are required, or no large facility investments. Such facilities as are used by businesses of this sort can be leased at relatively low initial cost. These factors to me suggest

relative ease of entry for competitors from an investment standpoint, and would in my judgment detract from the value of the business in terms of how a prospective investor would look at it.

A third factor I have considered is the market served by the subject company for crash parts from a single manufacturer. Business apparently is limited both by the scope of its products, product line, certainly as it was constituted in September, September 30th, 1972, and secondly as to the geographical area that it operated in.

This would suggest to a prospective buyer that there are limitations as to growth, as the business does exist, and would detract from his interest in buying the business.

Further, the business would have -- the buyer would have to assess competition for his product line. The product line is not unique and is generally available to the subject company's customers from other sources at apparently competitive prices.

In terms of the supply of crash parts to the company I note that the subject company is generally dependent on one source and that it is operating under an oral agreement with no formal contract as of September

30, 1972. I think any prospective buyer would look at a situation of that sort with alarm. Certainly he would assess the risk connected with relying on a single buyer on the fact that there are new firm contracts that could be passed on to him as a successor.

Finally in looking at the business as a service business, generally businesses of this sort depend to a considerable extent on the personal efforts of the principals or the officers of the company, in this case the owners of the company. A prospective buyer would conclude in my judgment that the liability of the business rested with the individuals and not with the company per se.

In buying such a business he would either have to retain the people, to retain their capabilities, or he would have to replace them with people of equal skill. In either case he would have to pay commensurate salaries for their efforts to attract additional people.' Or, if he had these skills he would certainly be justified in charging a salary for his efforts that are commensurate with the services he renders.

I think that any time that you look at a business where the value rests in individuals as it does in many service industries that this is a significant

negative from an investor's standpoint of looking at the viability of the business, or his ability to carry on the business in a profitable manner as a successor to it. In arriving at my value I have looked at the subject company and taken into consideration the various what I refer to as qualitative factors that I have outlined here, as a buyer would have to weigh in arriving at a risk judgment as to the corporation. Any investor has a broad spectrum of investments that he can look at as to return, as bench marks for returns. Beginning with the very low risk type of investment in 1972 a U. S. Government bond yielded approximately 5.6%, in 1972 corporate industrial bonds yielded about 7.4%, and utility bonds 8%, respectively.

I think this sets the bottom end for anyone in looking at investment, because this represents the basically no or low risk type of investment. Moving up the ladder in 1972 the corporations, overall corporations in the United States returned up to 10.6% on their equity investments. Companies in the auto, or motor vehicle and equipment area, turned in a return of 14.5% in 1972.

I present these as benchmarks representing average risk type returns for investors that he would

have looked at in assessing with this particular company fitted within the broad range of risks -- I think in my opinion the 14.5% return that the auto industry had in 1972 would certainly have represented a minimum return that he would have been interested in, and when assessing the various risks that I have outlined earlier and looking at the subject company, it is my judgment that he would have required a return in the area of 25% on his investment to compensate him for the risks that he was accepting.

Utilizing a 25% return on investment this basically four times earnings utilized 1972 net income as the basis for that investment, or that computation.

THE COURT: You multiplied four times 21?

THE WITNESS: Yes, sir. That's the same as a 25% return on investment.

THE COURT: All right.

MR. MAC CRATE: I have no further questions, your Honor.

THE COURT: I know we are running late, but if the Reporter and everybody -- I wonder if we could finish now.

MR. JULIEN: Can we finish tonight?

THE COURT: Can we finish now.

MR. JULIEN: I am willing to try.

THE COURT: All right. Let's try.

CROSS-EXAMINATION

BY MR. JULIEN:

Q You have been consulting some notes during the course of your discourse; may I see what you have?

A Yes. [Handing.]

Q Did you render any formal opinion to the people who engaged you here?

A No. Only orally.

Q This $21,000 figure to which you applied your formula, would you say that constituted the net profit for that year terminating September 30, 19 --

THE COURT: Here is the exhibit, BZ. 21,000 comes from -- it is net profit after taxes for 1972. [Handing.]

MR. JULIEN: I know that.

THE COURT: All right. I understand.

Q Were you aware that the net profit for September 30, 1972, that period ending that date, had been restated by Mr. Wasser at the conclusion of the period?

MR. MAC CRATE: Objection, your Honor.

THE COURT: Overruled.

MR. MAC CRATE: Well, your HOnor has already

ruled with respect to the restatement that the restated figures were not to be taken into consideration.

MR. JULIEN: I don't understand you to have ruled that way at all.

THE COURT: I don't recall ruling that way, but what is the restatement? Where did it appear and in what exhibit?

MR. JULIEN: Mr. Wasser testified that the original figure was a figure before the books had been closed, furnished on the motion before you --

THE COURT: Well, is there an exhibit?

MR. WASSER: Your Honor, in the injunction papers I --

THE COURT: Is there an exhibit in evidence?

MR. JULIEN: Yes, he says there is. What exhibit is that?

MR. MAC CRATE: Your Honor, the section of the prior transcript which I had reference to is in particular on Page 448.

THE COURT: What does it say?

MR. MAC CRATE: "The Court: I am not going to receive evidence about a revised loss of good will figure, and so that is that."

And it was our understanding that in the

context at that time that your HOnor was directing his attention to the witness' statement, "He questioned me as to whether I used the prestated, or restated figures. This brought to my attention the fact that I used the prestated figures.

"THE COURT: You knew about the restatement before you ever got to this trial, didn't you?

"THE WITNESS: But I took it objectively."

MR. JULIEN: That doesn't answer it at all. This is specifically what happened, and I think that I have submitted the exhibit your Honor is calling for to the Court.

THE COURT: I just would like to be clear. I know I have heard of the restatement, and right now I don't even know what it is. Does it appear in some exhibit that is in evidence? Is there a restated 1972 earnings?

MR. JULIEN: Yes, your Honor. Mr. Wasser testified to it, and it is in the statement of proposed damages which we submitted --

THE COURT: Well, that hasn't even been received. Exhibit 108 isn't even in evidence yet. That is the revised annual statement.

MR. JULIEN: But he has testified to it, your

Honor. It is in his testimony. And it has not been barred in any way. As a matter of fact, it has been carried from that into our computations.

THE COURT: Can you refresh my memory then? I don't recall that testimony.

MR. WASSER: Your Honor, I submitted it during the summertime to all parties.

THE COURT: I am worried about the evidence at the trial. Now, Mr. Julien, what was his testimony about the restatement?

MR. JULIEN: His statement was that after the books were closed for the period the restatement of the income for that period was $42,988. And that not only was it stated here --

THE COURT: What did he testify as to the reason for the restatement?

MR. JULIEN: Yes, he testified that the first statement with respect to the profit for that period was on the motion before your Honor, at which time the books had not been closed. And that the formal audit made after the books were closed was the figure of $42,988, which figure was also transmitted to the --

THE COURT: Do you have the transcript reference?

MR. JULIEN: I have no transcript.

THE COURT: I am just a blank on that.

MR. JULIEN: I have no transcript, but I can tell you this, that not only has he testified to it, but it is carried into the computations which were submitted to your Honor.

THE COURT: Only in that Exhibit 108 which I rejected. Look, let me just shortcut this. I will take your word that there is testimony now in the record about a revised restated 1972 -- listen to me, Mr. Julien.

MR. JULIEN: I am listening to you, sir.

THE COURT: [continuing] Earnings figure of $42,988. I also recognize that I did not permit you to put into evidence the revised figure for loss of good will which you proposed in Exhibit 108 marked for identification. Strange as it may see I don't think that precludes you from cross-examining the present witness about his computation. So, go ahead, I think the only thing, just so we are accurate, wasn't it 52? Have you got the right figures?

MR. JULIEN: Yes, $42,988. It's $52,388 pretax, and what is the deduction?

MR. MAC CRATE: And the tax is $21,988 leaving

$31,290.

THE COURT: I think it probably would be very simple. Did you consider a restated 1972 earnings figure?

THE WITNESS: I am aware of that figure, your Honor.

THE COURT: You are aware of it?

THE WITNESS: Yes.

THE COURT: What is your idea of what it is?

THE WITNESS: As I understand it, it was --

MR. JULIEN: Do you want your notes?

THE WITNESS: No, it's not in the notes. It is my understanding that it was an amount relating to the incentive program Ford had that was awaiting collection at year end and had not been collected and was subsequently paid to the corporation.

THE COURT: That was the reason for the restatement?

THE WITNESS: Yes.

THE COURT: What was the amount of the restatement?

THE WITNESS: My recollection is that it was approximately $22,000.

MR. JULIEN: Additional.

THE WITNESS: Additional.

THE COURT: So that the revised post-tax would be what?

THE WITNESS: Pre-tax figure was, I believe, $50,000 roughly. On that basis the after-tax figure would have increased approximately $11,000.

THE COURT: It would have increased by $11,000?

THE WITNESS: By approximately $11,000.

THE COURT: Bringing it up to about $32,000?

THE WITNESS: $32,000.

THE COURT: All right.

BY MR. JULIEN:

Q Mr. Hansen, first let's stay, did you consider that --

A I looked at it.

Q Did you consider it in making your computation of the value of this business?

A I made a separate computation based on that.

Q Now, the pre-tax figure as restated for income for that period is $52,388 less taxes brought down to a net of $42,988 after taxes.

Where did you get your figure from?

A You didn't apply any taxes to that $21,000 --

Q Where did you get your figure from?

A Which figure?

Q The figure that you said came to --

A $32,000?

Q $32,000, where did you get it from?

A I adjusted the $22,000 figure for taxes, but not adjusted for in your figures.

Q Well, did you use a gross income for that period -- not gross, did you use a profit figure before taxes of $52,388?

A That's right.

Q You did use it?

A Yes.

Q Did you use in the computation which you made?

A The one that I have outlined previously?

Q Yes.

A No.

THE COURT: That is a restated figure to your understanding, isn't it?

THE WITNESS: Yes.

Q I want you to assume that the net profit after taxes is $42,988 for that year ending September of 1972. Applying the formula which you applied of four times, what would the figure be of the value of that business?

A Well, first of all I disagree with the figure --

Q I want you to assume.

THE COURT: Let's just shortcut it. Is it just a matter of multiplying by four you would still multiply by four?

THE WITNESS: Yes.

THE COURT: If you multiply it, it would be about $200,000.

THE WITNESS: No, it would be approximately $160,000.

THE COURT: What are we using?

THE WITNESS: Four times 40,000.

MR. JULIEN: Four times 42,988.

THE WITNESS: About $168,000, approximately.

Q And the parameters of the multiplication factor which you can employ can be anywhere from four to fifteen?

A Not in my opinion.

Q Well, not in the opinion, but you have seen figures of from four to fifteen employed as the multiplying factor in arriving at what is the value of the business.

A Which business?

Q Of businesses in general.

A Business in general I have seen valued upwards of fifty times earnings.

Q By the way, you have --

A One time to fifty times.

Q You have never actually participated in the purchase or sale of the crash part wholesale business?

A No.

Q Would it matter whether a business is unique and does not have much competition in its field, would that make a difference?

A If it were, yes.

Q There are different types of investors, are there not? There are those who invest in a business in which they will personally participate? Yes?

A Yes.

Q And in that case the salaries achieved by the principals in the business are a matter of interest to them, isn't that so?

A Yes.

Q Now, in the method which you have employed you have deducted the officers' salaries in toto, have you not?

A Yes.

Q And in dealing with the hypothetical purchaser that you talked about if he were someone who is buying a business either in partnership or singly in which he

himself will participate, those salaries would be a matter of moment to him, would they not?

A Yes.

Q You know that the closest thing we come to a franchise business is these businesses are sold from time to time. You know that, don't you?

A What kind of franchise dealers are you speaking of?

Q In the automotive business.

A Yes.

Q Are you acquainted with those sales and purchases?

A Vaguely.

Q Have you ever evaluated a franchise dealer for a sale or a purchase?

A No.

Q You have never done anything like that?

A No.

Q If we take a figure of $42,988 as the net profit figure for the period which you employ, and crank back the officers' salaries, what figure would we achieve?

MR.MAC CRATE: Well, your Honor, that is a matter of multiplication.

MR. JULIEN: I know. That is a prelude to my next question.

THE COURT: What is the question?

MR. JULIEN: If we crank back the officers' salaries on top of the --

THE COURT: Have you done it?

MR. JULIEN: No.

THE COURT: I will take your mathematics.

MR. JULIEN: Please don't, your Honor. That is one thing I can't give you any insurance on.

THE COURT: The officers' salaries on top of what?

MR. JULIEN: The $42,988.

THE COURT: That is $125,000. Now, what is your question?

BY MR. JULIEN:

Q Do you know what sums were contributed to the pension fund for that same period?

A I think it was approximately $20,000, something like that.

Q And you are aware in a small business of this type that the greatest interest in the pension fund is with the principals?

A Yes.

Q Well, have you cranked back any part of that in the basic figure of your computation?

A No.

THE COURT: Do you want him to crank?

MR. JULIEN: Well, since we are dealing with Fords, let's pretend.

THE COURT: You are up to 125, and you put him back another 20, so that is 145, then we multiply by 4?

MR. JULIEN: Are we going to insist on the 4, your Honor?

THE COURT: All right.

Q Tell me this, sir: Are you acquainted with conditions in this New York area as they were in 1972 with respect to this one firm which was pursuing the business of the sale at wholesale of crash parts not in the Ford enterprise?

A Would you please --

Q Do you know anything about --

MR. MAC CRATE: I object to that, "in the Ford enterprise," your Honor. There is nothing --

MR. JULIEN: I will withdraw it. I will withdraw it.

Q You told me that from the commencement of this

firm its growth and earnings was good?

A Yes.

Q Its growth and sales was good?

A Yes.

Q With the comparatively small investment they showed a rather sizable increase year to year; isn't that so?

A Yes. No, they did in sales, they did not in net income in recent years.

Q Well, again are you talking about the income figure which you employed, or the restated income figure which I gave you?

A The income figure I employed.

Q Adopting the income figure which I gave you, it does show a good gain in profit from year to year; is that right?

MR. MAC CRATE: Your Honor, I object.

THE COURT: Sustained.

Q By the way, did you look at the audit of this company for the year 1973?

A I don't believe I saw an audit. I saw some figures.

Q You saw some figures?

A Handwritten form. I am not aware that that

was an audit.

Q Did it appear to be a statement of profit and loss?

A Yes.

Q Based upon the figures of profit and loss for the year 1973 would you say that this business has diminished in value?

A Based on those figures, yes.

Q And based on those figures using the same formula which you employed is there a loss for 1973?

MR. MAC CRATE: Your Honor, I think that Mr. Julien is apparently making this witness his own.

THE COURT: Are you objecting? I will sustain the objection.

MR. MAC CRATE: Objection.

THE COURT: Is there a 1973 statement in evidence? I have got some -- yes, Exhibit CA is a kind of a partially handwritten, partially typed statement. It is in evidence and I have got it.

MR. JULIEN: Yes, and if your Honor would just pass that to the witness for a moment.

THE COURT: All right. [Handing.]

Q Are those the figures which you examined, which you saw for the year 1973?

MR. MAC CRATE: Your Honor, I object to questioning as to the year 1973.

THE COURT: Overruled.

MR. MAC CRATE: Your Honor, the only --

THE COURT: Overruled. Please, we are about at the end.

Q Are those the figures which you saw?

A That's not the same statement that I saw, no.

Q Well then, let's just look at --

THE COURT: I'll tell you, maybe this will help you. There is another sheet, Mr. Julien, it isn't in evidence. [Handing.] To save time.

Q In accordance with an exhibit which we have in evidence I want you to assume that for the year ending September 30, 1973, the net profit after taxes, instead of showing a profit, showed a loss of $85,954. Now, based on that, sir, what do you say is the value of this company in accordance with the formula you have employed as of September 30, 1973?

MR. MAC CRATE: Objection, your Honor, unless the witness is permitted to examine the entire statement from which he --

MR. JULIEN: I have asked him to assume.

THE COURT: Let's cut it short. If you can

answer, then fine. If you can't --

THE WITNESS: I don't think that I am prepared to answer the question.

THE COURT: All right.

A I am going to ask you, I have a right, I think, your Honor, to ask him to hypothecate and to assume, and I ask you --

THE COURT: You ask him to assume certain facts and see if he can answer it.

MR. MAC CRATE: Your Honor, the direct testimony was directed simply to the year 1972.

MR. JULIEN: That doesn't cut off anything, your Honor. It doesn't cut off a thing.

MR. MAC CRATE: And the further examination goes entirely on the subject of the --

MR. JULIEN: I am entitled to test his credibility. I am entitled to test his expertise. And I may use something else other than that which counsel --

THE COURT: Well now, Mr. MacCrate does have a point. You are not entitled, it seems to me, to make him your own expert on a subject not covered by the direct, and the subject, the only subject covered by the direct was the value of the company as of September

30, 1972. You are certainly entitled to examine him as to anything that bears on his direct testimony, but I think that the value as of September 30th, 1973, and the loss of value then is a sharply different subject, it is obviously relevant to the case, but I think you have got to have your own expert on that which you have already produced.

In any event, it is not proper cross. So I will sustain the objection to cross-examination about his valuation as of September 30, 1972.

All right, do you have anything else? Okay.

MR. JULIEN: I have to say, okay, but it's not okay, your Honor. I respectfully except from that ruling.

THE COURT: It is a slip of the tongue.

MR. JULIEN: Yes, it's all right.

Q Now, when you were given this formula that you devised were you considering people who would want to enter into this business on their own account?

MR. MAC CRATE: I can't hear you, Mr. Julien.

THE COURT: A little louder.

MR. MAC CRATE: What was the question, please?

[Question read.]

THE COURT: Well, of course he did. That's

what he said.

MR. JULIEN: Well, just a minute, your Honor. He kept talking about an investor.

Q Now, are you talking about an investor who --

A A businessman or --

Q Who would not be working in this business?

A Either one. Looking at it from the standpoint of a willing buyer. Whether he has the knowledge or he lacks the knowledge.

Q The business has the same value to a silent investor as it does to a man who will make his living at it; is that your testimony?

A Partly, yes.

Q Are you an accountant by the way?

A No.

Q Well, are you acquainted with any businesses or any firms in the public market that are engaged in the purchase or sale of automobile parts?

A Yes.

Q Do you know a firm by the name of Genuine Parts?

A Yes.

Q And this is a wholesaler of automobile parts?

A It is a wholesale warehouser.

Q They are listed in the stock exchange, are they?

A Yes.

Q Well, even in the present depressed market, at what ratio of earnings towards price is the stock of that company selling?

A Well, aside from my feeling that it's totally irrelevant --

Q No, no, I am not asking you what's relevant.

A About 15 times.

THE COURT: I think we have got to conclude now.

Have you got anything further?

MR. JULIEN: I am almost through. I want to

call your Honor's attention in response to the question about the restated taxes -- restated income for the period ending September 30, 1972, that is found in Exhibit CB, net profit or loss after officers -- what is that salary?

THE COURT: You can call my attention to it. Let's not take time to read things.

MR. JULIEN: That figure is in.

THE COURT: All right.

Q You mentioned something about a single source of supply.

Did you inquire as to whether or not this firm had ever had any difficulty in securing supplies before a certain cut off event took place in September 30th of 1972?

A Well, only to the extent that anything of that sort appeared in the transcript, I don't specifically recall anything though.

Q Well, did you know that up to that date they had had no difficulty in securing their supplies at all? Did you know that?

A Yes, I am generally aware of that.

Q And of course, you're thinking about what a possible investor or a purchaser of the business may be thinking of in 1972, that's a speculative matter, isn't it?

A No, I think it's based on my judgment as to-- drawn on many years of experience.

Q Your judgment deals principally with publicly held companies, isn't that true?

A No.

Q Isn't it?

A No, it does not.

Q Well, it has to do with mergers and acquisitions, is that it?

A It has always to do with evaluation of privately held companies.

THE COURT: He's already testified he has done it for state and tax purposes.

Do you have anything else?

MR. JULIEN: No, I think that will be sufficient.

REDIRECT EXAMINATION

BY MR. MAC CRATE:

Q Mr. Hanse, do you regard the price earnings ratio of Genuine Parts to be relevant to the valuation of the subject company?

MR. JULIEN: I object to it. Relevance is a matter for your Honor to determine.

THE COURT: Well maybe it's not phrased exactly right, but it's an obvious question on redirect.

What's your answer?

A I regard it as totally irrelevant. Genuine Parts is basically a nationwide company, it sells all kinds of products, buys from all kinds of manufacturers, it has sales in the area of five to six hundred million dollars and net income of $21 million. I think it's totally different from the company we are talking about.

MR. JULIEN: One question.

THE COURT: Do you rest? What's the one question?

MR. JULIEN: So glad to see your Honor smiling at this hour.

Q When people buy intc that Genuine Parts company, they are paying 15 to 16 times earnings for a minority interest in the business, right?

A That's right.

(Witness excused)

THE COURT: Does Ford rest?

MR. MAC CRATE: Ford rests, your Honor.

THE COURT: Now, we will of course suspend. It's awfully late. I think that we have to consider what briefs, if any, are to be submitted.

My reaction right now is --

MR. JULIEN: I am not complete. I haven't rested.

THE COURT: No?

MR. JULIEN: Your Honor has asked questions of us, and I have had Mr. Wasser working on the very questions that you have asked about having to do with the specifics of the wholesale inventory units, and they have been doing an audit on that since you asked that question.

I think you would be interested in the results of that. They ought to be interested because the figure actually comes down a bit from what we have presented to you.

MR. MAC CRATE: Your Honor, this is trying to shore up the plaintiff's case.

MR. JULIEN: Shoreing up nothing. I am responding as you did to question addressed by the Court to you.

MR. MAC CRATE: This is after the plaintiff rested.

THE COURT: Let me just state something in general.

I feel that I would like to take time now with myoffer to go over what is now in the record and to get into the legal authorities in as much depth as I can, which I feel the case is really quite difficult on the law, and I would -- what I was going to say and I didn't know that you had any more evidence, but I was going to

say this to both of you.

Before anybody does anything further I'd like to use to the maximum extent what's been given me now. Several briefs on various subjects, and we have the evidence in the record we have.

I think the difficulties that I now see in the case may evaporate as I learn the law better, and go over the record. I don't think they will evaporate, and I think it will remain a difficult case to decide.

And I would say that after I get through the kind of review I have in mind, which ought not to take a long time, I won't have any hesitation to ask you to submit further briefs or to -- I would ask -- if I see gaps in the evidence, to ask for the evidence to be supplemented, because I feel that the case is difficult, and I am quite certain -- I would assume it would go up to the Court of Appeals, I think it could end up going to the Supreme Court, and I think we all have an obligation in a case like this to have a complete record on the necessary points.

I have been puzzled at the emphasis on some points and the gaps on other points, but that's -- I probably don't really know as much about the case as the lawyers do and that's the reason for my puzzlement.

But I really would like to go over what I have and then there may be additional evidence from the Ford side as far as their purpose.

I really feel it is absolutely mandatory to complete the record and I wouldn't hesitate to call on you, and I don't care who has rested. If I feel I need information to decide the case I will call.

MR. JULIEN: If I can put this in by way of exhibits.

THE COURT: It's far too late and I really have to go. I think if you want now to put on a rebuttal case, or re-open your case in chief [illegible], I obviously can't do it tonight.

MR. JULIEN: I understand.

THE COURT: And it can't be done by just introducing an exhibit. If you've got an exhibit show it to Mr. MacCrate, it will give him time to look it over, see what specific problems he's got, and then maybe we could be in touch about -- if you want to introduce further evidence, I think what you ought to do is to write me a letter and say whether it's by way of re-opening your case in chief, or rebuttal or what it is, and then Mr. MacCrate will be able to respond, and we will have the issue joined. I just can't do it tonight.

MR. JULIEN: I understand, your Honor. This will take just one moment. But I don't want the record to be left in the position where your Honor addressed a question to us as to can't this be done.

This very thing we have done originated with a question you addressed tous.

THE COURT: I am aware of that.

MR. JULIEN: We did it. We spent an enormous amount of time to do it.

THE COURT: I will certainly be interested in that.

MR. JULIEN: May we append it to our brief?

THE COURT I don't know. I would assume if it's a different piece of evidence, if it's different evidence, it's got to come in as evidence, but dowhat I suggested.

It seems to me for the sake of efficiency so we don't all come together again without knowing what we are coming together for, could you just write me and say what you intend to do, a copy to Mr. MacCrate. Show Mr. MacCrate the proposed exhibit and then let Mr. MacCrate-- I don't mean a 15-page single spaced letter but just a proposal of what you want to do, and then if we need to have a hearing we will have a hearing and we will schedule

it. Can't you do that?

MR. JULIEN: I can.

THE COURT : So that you are not resting. Until I hear from you, until we resolve your proposals, your request is still open.

Okay?

We will adjourn on that condition.

MR. MAC CRATE: Your Honor, you did request briefs on several points. We have in preparation -- we were waiting the closing of the record to complete them --

THE COURT: I thought you submitted briefs on all the points I have asked you about.

MR. MAC CRATE: In particular, you mentioned additional material on indirect purchases. We can have that brief in your hands very promptly.

THE COURT: I don't want a multiplication of briefs. I want all the material I can get but I just think that it probably ought to have some order. If you want to submit a memorandum on an indirect purchaser, go ahead and do it.

Is that the subject?

MR. MAC CRATE: Yes. And then we also were waiting for the conclusion to give you a memorandum on damages and relief generally.

MR. JULIEN: What is your position about briefs in general.

THE COURT: I thought I had received all the briefs I could digest.

MR. JULIEN: On the law.

THE COURT: That I could digest so far.

MR. JULIEN: How about putting these exhibits in proper context and discussing the testimony? Don't you want us to do that for you?

THE COURT: I think I have just got to go.

Now, why don't you -- could you give me short letters of what you propose as far as further briefs, as far as any further evidence. Just you start, Mr. Julien, and you answer Mr. MacCrate, but hold off [illegible] anything until we get the thing organized.

Okay.

t7 (Adjournment sine die)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
William A. Beers (Resumed)	845	865	904	
Alfred T. Hansen	908	938	959	

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DB		868
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